(37,433)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 736

IVAN E. OAKES, PETITIONER,

vs.

BEN LAKE, AS SHERIFF OF OWYHEE COUNTY, IDAHO

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

	Page
Record from district court of the United States, District of Idaho	11
Amended complaint	11
Order appointing receiver, circuit court of Malheur County	15
Answer	21
Judgment	25
Motion for new trial	26
Order denying motion for new trial	27
Petition for order extending time	27
Order extending time	28
Petition for appeal	28
Order allowing appeal	29
Bond on appeal	30
Bill of exceptions	32
Caption	32
Testimony of Ivan E. Oakes	32
Plaintiff's Exhibit 2—Letter, Oakes to sheriff, July 28, 1931	56

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 15, 1933

	Page
Plaintiff's Exhibit 1—Judgment roll in circuit court of Malheur County	57
Testimony of H. G. Blackwell	63
Motion for non-suit	74
Stipulation as to bill of exceptions	76
Order settling bill of exceptions	77
Stipulation as to Plaintiff's Exhibit 1	78
Order as to Plaintiff's Exhibit 1	79
Assignments of error	80
Citation	82
Præcipe for transcript of record	83
Clerk's certificate	84
Proceedings in United States circuit court of appeals, ninth circuit.	85
Order of submission	87
Order directing filing of opinion and decree	88
Opinion, Sawtelle, J.	88
Decree	94
Motion for order staying mandate	95
Order staying issuance of mandate	96
Clerk's certificate	98
Order allowing certiorari	99

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
DISTRICT OF IDAHO

IVAN E. OAKES, as Receiver,

Plaintiff,

vs.

BEN LAKE, as Sheriff of Owyhee
County, Idaho,

Defendant.

No. 1633

AMENDED COMPLAINT

Filed November 20, 1931

Comes now the above named plaintiff and after leave of court had and obtained, for his cause of action against the defendant, alleges and shows to the Court:

I.

That the plaintiff is a resident and inhabitant of the State of Oregon, and is the duly appointed, qualified

and acting receiver of all of the property hereinafter mentioned and was so appointed as receiver by an order of the Circuit Court of the State of Oregon for Malheur County on the 17th day of March, 1931, as more fully appear from a copy of the said order of appointment attached to this complaint, hereby referred to and by this reference made a part of this complaint.

II.

That after such appointment, the plaintiff herein qualified by subscribing an oath of office and filing his bond in the amount of $10,000, which bond was thereupon approved by the Court and thereupon this plaintiff took into his possession all of the property hereinafter described.

III.

That the defendant is the duly elected, qualified and acting sheriff of Owyhee County, Idaho, and is a resident and inhabitant of said county and state.

IV.

That the amount in controversy in this action exceeds the sum of $3000. exclusive of costs and disbursements, as more particularly appears hereinafter.

V.

That heretofore and at all of the times hereinafter mentioned, one W. S. Skinner was the owner of certain personal property, among other, to-wit: approxi-

mately 45 head of cows of mixed ages, 29 head of two-year old steers, 22 head of one-year old steers, 27 head of one-year old heifers, 16 head of calves, and 2 bulls, all branded SS on the left hip. That all of said personal property had theretofore been mortgaged to the Equitable Trust Company as trustee, said Equitable Trust Company being a corporation organized under the laws of the state of Oregon, doing a trust business in the city of Portland, Multnomah County, Oregon.

VI.

That thereafter the said W. S. Skinner made default in the payment of the sums due under said trust deed and mortgage, and thereupon the said trustee declared a default in the terms of said trust deed and commenced a suit in the Circuit Court of Malheur County, Oregon, for the foreclosure thereof, and in said suit the plaintiff herein was appointed and did qualify as the receiver, as aforesaid, and that upon the said 17th day of March, 1931, or immediately thereafter and prior to the 20th day of March, 1931, this plaintiff, as receiver, took into his possession, among other things, all of the aforesaid and above described personal property.

VII.

That the said receiver is now and at all times herein mentioned has been entitled to the immediate and exclusive possession of said personal property above described.

VIII.

That on or about the first day of July, 1931, the above-named defendant took possession of said personal property, particularly described, in Owyhee County, Idaho, by virtue of an attachment in a suit wherein one David Sommerville was plaintiff and one W. S. Skinner was defendant. That said defendant now holds said cattle by virtue of such attachment.

IX.

That this plaintiff has heretofore and prior to the comment of this action caused a demand to be made upon the said defendant for the return of said cattle to the plaintiff, but that the defendant refused and still refuses to return said cattle in accordance with said demand, or otherwise.

X.

That said personal property is of the reasonable value of $5000.00.

WHEREFORE, plaintiff prays for a judgment of this court decreeing and finding that the plaintiff is the owner of and entitled to the immediate possession of said personal property, and in lieu thereof, that the plaintiff have judgment against the defendant for the sum of $5000.00, together with his costs and disbursements as herein expended.

P. J. GALLAGHER,

Attorney for Plaintiff.

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MALHEUR

EQUITABLE TRUST COMPANY, formerly LUMBERMENS TRUST COMPANY, of Portland, Oregon, a corporation,

Plaintiff,

vs.

W. S. SKINNER and ELLA SKINNER, husband and wife; WILLIS G. THOMPSON; and LUMBERMENS SECURITIES CORPORATION, a corporation,

Defendants,

No.

ORDER APPOINTING RECEIVER

Now on this 17th day of March, 1931, this cause came on for hearing upon the bill of complaint and upon the application of plaintiff for the appointment of a receiver, and the Court having listened to the statement of counsel, and being fully advised in the premises, and the Court finding that it has jurisdiction; and further

it appearing to the Court that it is provided in the mortgage or trust deed, to foreclose which the bill of complaint in this cause was filed, that upon the finding of a foreclosure suit the plaintiffs in such suit should be entitled as of right, without notice, to the appointment of a receiver of the mortgaged property, and that said defendants, W. S. Skinner and Ella Skinner did thereby irrevocably consent to such appointment; and it further appearing to the Court that the property of said defendants, W. S. Skinner and Ella Skinner referred to in the bill of complaint herein and covered by the mortgage or deed of trust therein mentioned sought to be foreclosed, is inadequate security for the payment of the bonds secured by said mortgage or deed of trust, and is inadequate security for the protection of the holders of the bonds issued under said mortgage or deed of trust and now outstanding, and that it is necessary and essential to the protection of the plaintiff and of the holders of the bonds outstanding under said mortgage or deed of trust that a receiver be appointed to take charge and possession of all the property of the defendants, W. S. Skinner and Ella Skinner covered thereby, and to manage, control, operate, conserve, and maintain said property: and it further appearing to the Court that it is to the best interest of said bondholders that said receiver be authorized to continue the business of said defendants, W. S. Skinner and Ella Skinner;

IT IS THEREFORE ORDERED, AD-

JUDGED AND DECREED:

1. That the motion for the appointment of a receiver and the prayer of the bill of complaint for the appointment of a receiver be and the same are hereby granted, and that Ivan E. Oakes be and he is hereby appointed receiver of all and singular the assets, lands, tenements and hereditaments of the defendants, W. S. Skinner and Ella Skinner covered by said mortgage or deed of trust, and all their property, real, personal and mixed, of every kind and nature covered by said deed of trust.

2. That the receiver shall, before entering upon his duties hereunder, give and file with the Court a bond in the penal sum of Ten Thousand ($10,000) Dollars, with surety or sureties approved by this Court and conditioned that he will faithfully perform his duties as receiver herein, and will well and truly account for any and all moneys or properties coming into his hands as such receiver, and abide and perform all things which he is herein or may hereafter be directed to perform in this cause.

3. That upon the filing and approval of said bond and the execution of an oath according to law, said receiver be and he is hereby authorized, empowered, and directed to take immediate possession of all and singular the property, both real and personal described in or subject to the said mortgage or deed of trust, all of which is to be done until the further order of this Court.

The receiver shall exercise all such powers as are usually exercised by receivers, and all such as are necessary or convenient to the proper conduct by him of the business of the defendants, W. S. Skinner and Ella Skinner, and he shall discharge all such duties as are within the line, scope, or purpose of his appointment.

4. That the said defendants, W. S. Skinner and all their agents, employees, and other persons claiming under them, are now hereby ordered, commanded, and directed to turn over and to deliver to such receiver the possession of all of the property, both real and personal, now in their hands or under their control, or which may hereafter come into their hands, control, or possession.

That the said defendants, W. S. Skinner and Ella Skinner and all their agents, employees, and other persons claiming under them, be, and they are now hereby, restrained and enjoined during the pendency of this cause and the administration of said receiver, from transferring, selling, disposing of, or in any wise interfering with any of the property, either real or personal, subject to the terms of said mortgage or trust deed; and from disturbing, preventing, or in any wise interfering with the receiver in his possession, control, operation, and management of the property, or any part thereof, over which the said receiver is appointed as such, and from disturbing, preventing, or in any way interfering with the receiver in the discharge of his duties hereunder.

5. The receiver, in operating, conducting, and man-

aging the business of the defendants, W. S. Skinner and Ella Skinner, is, until the further order of this Court, hereby authorized and empowered:

(a) To manage and operate the said property and business of the defendants where the same is a going concern in such manner as will, in his judgment, produce the most satisfactory results;

(b) To employ and discharge, and fix the compensation of all such employees as are in the judgment of the receiver deemed necessary to aid in the discharge of his duties herein authorized;

(c) To institute and prosecute such suits as may be necessary in the judgment of the receiver to protect the property and trusts thereby vested in him, and to likewise defend all such actions as may be instituted against him as such receiver, and also to assume and take the prosecution or defense of any and all suits now pending against or by the defendants, W. S. Skinner and Ella Skinner, the prosecution or defense of which will, in the judgment of said receiver, be necessary for the proper protection of the property placed in his charge; but all attorney fees therein incurred are to be subject to the approval of this Court;

(d) To keep the property of the defendants hereby placed in his possession and control in-

sured in the same manner and to the same extent as it was insured by the defendants themselves, or as, in the judgment of the receiver, may seem fit and proper;

(e) To preserve the trust property in good order and condition, making all needed repairs thereon;

6. That the receiver acquaint himself at once with the extent and condition of the property coming under his control, and within thirty days hereafter make and file with this Court a full and comprehensive inventory showing the property in his hands.

7. That a person selected by the receiver be and is hereby appointed the attorney and counsel for the receiver at such fees as may be hereafter allowed him by the Court.

8. That the said receiver shall, at quarterly periods hereafter, until the further order of this Court, file itemized reports showing his receipts and disbursements.

DATED at Vale, Oregon, the 17th day of March, 1931.

(Signed) W. W. WOOD,

Circuit Judge.

(Duly verified.)

(Title of Court and Cause.)

ANSWER

Filed Nov. 30, 1931

Comes now the above defendant and answering the amended complaint of plaintiff admits, denies and alleges as follows:

I.

The defendant has no knowledge, information or belief as to whether the plaintiff was appointed receiver and qualified as such, as alleged in Paragraphs I and II of the amended complaint and basing his denial on that ground the defendant denies the allegations of said paragraphs.

II.

The defendant denies that the plaintiff took into his possession all of the property, or that he took into his possession any of the property described in the complaint.

III.

The defendant admits the allegations of Paragraph III of the amended complaint.

IV.

The defendant denies the allegations of Paragraph IV of the amended complaint.

V.

The defendant denies the allegations of Paragraphs V, VI and VII of the amended complaint, and particularly denies that the plaintiff, as receiver or otherwise, at any time took into his possession or had in his possession any of the property described in the complaint.

VI.

The defendant denies that the plaintiff is entitled to the possession of said property.

VII.

Answering Paragraph VIII, the defendant denies the same, but admits that by virtue of a valid writ of attachment in a suit wherein one David Sommerville was plaintiff and W. S. Skinner was defendant, he took approximately one hundred head of range cattle belonging to the said W. S. Skinner into his possession in Owyhee County, Idaho.

VIII.

The defendant denies the allegations of Paragraph IX of the complaint.

IX.

The defendant denies the allegations of Paragraph X of the complaint.

Further answering the complaint the defendant alleges:

I.

That the defendant, as sheriff of Owyhee County, Idaho, in the month of July, 1931, had placed in his hands a valid writ of attachment duly issued out of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Owyhee, in an action of debt in which one David Sommerville was plaintiff and W. S. Skinner was the defendant, said writ ordering and directing the defendant as such Sheriff to attach the property of the defendant W. S. Skinner within Owyhee County.

II.

That the said David Sommerville, plaintiff in said action, is and was at that time a resident of the State of Idaho and was a creditor of the said W. S. Skinner.

III.

That pursuant to the aforesaid writ, and pursuant to a writ of execution subsequently issued upon a judgment regularly obtained in the same cause, the defendant took into his possession approximately one hundred head of range cattle belonging to the said W. S. Skinner, which cattle were then in Owyhee County, Idaho, and were in the possession of the said W. S. Skinner and his employees.

IV.

That no claim or demand, as provided to be made by Sections 6918 and 6805 of the Compiled Statutes of

Idaho, was made by the plaintiff herein or by any other claimant.

V.

The defendant further alleges that the property so seized by him under and by virtue of said writ of attachment did not exceed in value the sum of $2100.00.

VI.

Further answering the amended complaint the defendant says that the plaintiff as receiver appointed by the Circuit Court of the State of Oregon for Malheur County has no capacity to sue herein.

WHEREFORE, having answered the amended complaint the defendant prays that the plaintiff take nothing by reason of this action and that the defendant be sent hence with his costs in this behalf expended.

EARL E. GARRITY,

Residence: Silver City, Idaho,

WM. HEALY,

Residence: Boise, Idaho,

Attorneys for Defendant.

(Duly verified.)

(Title of Court and Cause.)

JUDGMENT

Filed Feb. 11, 1932

The trial of the above cause having come on regularly to be heard before the above entitled court sitting with a jury, and the plaintiff having introduced his evidence and having rested his cause and a motion for non-suit having been made for and on behalf of the defendant, and the Court having thereupon rendered his decision, granted the non-suit upon grounds stated by the Court,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that a judgment of non-suit in favor of the defendant and against the plaintiff be, and the same hereby is granted, and said cause is hereby dismissed, and it is ordered that the defendants be and they are awarded judgment for their costs and disbursements herein expended, the same being fixed in the sum of $109.70.

Witness the Honorable Charles C. Cavanah, Judge of said court, and the seal thereof this 11th day of February, 1932.

(SEAL) W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

MOTION FOR NEW TRIAL

Filed Mar. 5, 1932

Comes now the plaintiff herein, by his attorney P. J. Gallagher, and moves the court for its order setting aside the directed verdict and order of involuntary non-suit made and entered in this cause upon the motion of the defendant, on the 18th day of February, 1932.

This motion is based upon the ground that there was error of law in the ruling of the court in granting said motion of the defendant, in the following particulars, to-wit:

(1) The motion of the defendant for a directed verdict was based upon the ground that proof of the demand made by the plaintiff upon the sheriff for the return of the cattle described in the complaint, did not comply with the requirements of Section 6918 of the Idaho Compiled Statutes, inasmuch as said demand actually served was not verified.

The court sustained said motion and directed verdict for the defendant and the plaintiff most respectfully urges that such ruling was erroneous and based upon said ground the plaintiff moves that the judgment of non-suit be set aside and the case set down for new trial.

Respectfully submitted,

P. J. GALLAGHER,
Attorney for Plaintiff.

(Title of Court and Cause.)

ORDER.

Filed Mar. 21, 1932

The motion for a new trial of the plaintiff in the above cause having been submitted, and after consideration thereof by the court:

IT IS HEREBY ORDERED That said motion be, and the same is denied.

CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause.)

PETITION FOR AN ORDER EXTENDING THE TIME TO PREPARE AND FILE TRANSCRIPT

Filed June 17, 1932

COMES NOW the petitioner, Ivan E. Oakes, as Receiver, by his attorney P. J. Gallagher, and prays the Court for its order extending the time in which to prepare and file a transcript of above proceedings until the 15 day of July, 1932, and until July 15th, 1932, in which to settle and file a bill of exceptions.

P. J. GALLAGHER,
Attorney for Petitioner and Appellant.

(Title of Court and Cause.)

ORDER EXTENDING TIME IN WHICH TO PREPARE AND FILE TRANSCRIPT

Filed June 17, 1932

This matter coming on upon petition of the appellant for an order extending the time in which to file a transcript in the Circuit Court of Appeals in the above-entitled matter, it is therefore

ORDERED that the plaintiff and appellant have to and including the 15th day of July, 1932, in which to prepare and file his transcript in the Circuit Court of Appeals in the above-entitled cause, and until July 15th, 1932, in which to settle and file a bill of exceptions.

CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause.)

PETITION FOR APPEAL

Filed June 17, 1932

TO THE HONORABLE CHARLES C. CAVANAH, JUDGE OF THE DISTRICT COURT

FOR THE DISTRICT OF IDAHO, SOUTHERN DIVISION:

Ivan E. Oakes, as Receiver, your petitioner, who is the plaintiff in the above-entitled cause, prays that he may be permitted to take an appeal from the judgment and order entered in this cause on the 10th day of February, 1932, directing a non-suit in said cause, and the judgment based thereon which was entered in said cause on the 11th day of February, 1932; and also from that certain order made and entered on the 21st day of March, 1932, refusing to grant to the petitioner herein a new trial, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith, and petitioner also desires that this Court fix the amount of the bond which he shall give and furnish upon said appeal.

Dated this 17 day of June, 1932.

P. J. GALLAGHER,
Attorney for Petitioner and Appellant.

(Title of Court and Cause.)

ORDER ALLOWING APPEAL

Filed June 17, 1932.

NOW COMES Ivan E. Oakes, as Receiver, and

presents to the Court its petition for appeal in the above-entitled cause, praying that its appeal be allowed, and for an order fixing the security to be required of it to perfect said appeal.

IT IS NOW ORDERED that said petition be granted and said appeal allowed upon giving the bond required by law and conditioned as required by law, in the sum of $300.00, said bond to be approved by this Court.

Dated this 17th day of June, 1932.

CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause.)

BOND

Filed June 25, 1932

KNOW ALL MEN BY THESE PRESENTS: That we, IVAN E. OAKES, Receiver, as principal, and Massachusetts Bonding and Insurance Company, as surety, are held and firmly bound unto BEN LAKE in the full and just sum of three hundred ($300.00) dollars, to be paid to the said Ben Lake, his certain attorneys, successors, or assigns, to which payment, well and truly to be made, we bind ourselves, our successors and assigns jointly and severally, by these presents.

Sealed with our seals and dated this 23rd day of June, in the year of our Lord, 1932.

WHEREAS, lately at an action at law pending in the above entitled court between Ivan E. Oakes, plaintiff, and Ben Lake, defendant, a judgment of non-suit was rendered against the said Ivan E. Oakes, and said Ivan E. Oakes having obtained leave to appeal to the Circuit Court of Appeals of the Ninth Circuit, and having filed a petition therefore in the clerk s office of said court to reverse the said order of non-suit and the citation directed to the said Ben Lake citing and admonishing him to be and appear at the Circuit Court of Appeals for the Ninth Circuit to be holden in the city of San Francisco within thirty days from the date thereof.

Now the condition of the above obligation is such, that if the said Ivan E. Oakes shall prosecute his said appeal to effect and answer all costs if it fails to make its plea good, then the above obligation to be void, else to remain in full force and effect.

(Seal) IVAN E. OAKES, Receiver,

Principal.

By P. J. GALLAGHER,

Attorney for Principal.

MASSACHUSETTS BONDING AND INSURANCE COMPANY, Surety,

By M. L. GILBERT,

Attorney-in-Fact.

The foregoing bond is approved this 25th day of June, 1932. CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause.)

BILL OF EXCEPTIONS

Filed July 2, 1932

BE IT REMEMBERED that on the 10th day of February, 1932, at Boise, Idaho, the above-entitled cause came on for hearing before the Honorable Charles C. Cavanah, with a jury, the plaintiff appearing by P. J. Gallagher, and the defendant appearing by William Healey. After the opening statement by counsel, the following proceedings were had:

Thereafter a jury was impanelled and sworn and the trial commenced on the said 10th day of February, 1932. Whereupon, the plaintiff, to sustain the issue upon his part, called IVAN E. OAKES, as a witness in his behalf, and the said IVAN E. OAKES testified as follows:

That his name was Ivan E. Oakes; that he resided in Ontario, Malheur County, Oregon; that he was the same Ivan E. Oakes who on March 17, 1931, was appointed receiver in the case of Equitable Trust Com-

pany v. Skinner; that on the 28th day of March he took a certified copy of his authority as receiver and went to the Skinner place and gave it to Mr. Kirt Skinner, the only one there at the time.

Q. At that time was there any livestock on the premises?

A. Yes.

Q. Was there any cattle there?

A. Yes.

Q. Tell approximately how many cattle were on the place?

A. I do not know because part of them belonged to Mr. Skinner and some belonged to the Equitable Trust Company or the bondholders.

Q. Did you examine the cattle on the place at that time?

A. I went around amongst them some, yes.

Q. Did you examine them as to whether or not any of them were the cattle that you were to take possession of when you were there?

A. Yes.

Q. And could you give the court and jury any idea of the number in the field at that time?

A. I could not.

Q. Did you have a list or inventory of the cattle or the property covered by the mortgage?

A. Yes.

He further testified that he made a report to the court of the number of cattle at that time, which is contained in his files. This was March 28, 1931.

Q. Later on were these cattle taken by the Sheriff of Owyhee County?

A. Yes.

He further testified that, the day I came there, March 28, Mr. Kirt Skinner was the only one there. He denied and disputed the right to have them taken over by the receiver at that time, at that particular time. He said there were part of the cattle out on the range and part in the field, and that they would take care of them.

Q. Was there any further conversation had regarding the possession of the property with Skinner after you showed him the certified copy of the appointment?

A. He still objected.

Q. What did he say about taking care of the cattle?

A. He said he would take care of them.

The witness further testified that he left a man on the premises; that his general duties were feeding what cattle and horses there were left there, doing general work and caring for the property; that he gave him instructions from time to time what to do.

The witness then testified that he arranged for the Skinner people to live on the property after the sale in August. That he had further arranged with them to put up the hay on the property, on the farms.

The witness then testified that his occupation from 1926 to 1930 was manager of the Pacific Livestock Company at Burns, which was engaged generally in the cattle business; that his duties were whatever work there was in connection with the operation of that

property, buying and selling property and such other business as that; that there were twelve thousand head of cattle under his supervision; that he was buying and selling on the market; that he was familiar with the class of cattle on the Skinner property as to type and breed; that he left the employ of the Pacific Livestock Company in 1930; that that property is situated in Harney County, Oregon, immediately west of Malheur County, and their cattle ranged in Malheur County; that he had witnessed sales, witnessed other buyers in Malheur County.

Q. I will ask you if you are acquainted with the fair general market value of the cattle that were involved in this transaction in the vicinity they were on or about the first day of July or the latter part of June, 1931?

A. I think I am.

Q. Now I wish you would testify as to what you consider to be the fair general market value of the cows and calves that were involved in this lawsuit about the time the cattle were taken in June?

Thereupon Mr. Healey was permitted to ask the following questions:

Q. I will ask you whether or not you saw these cattle supposed to be taken by the Sheriff?

A. I am not sure of it.

Q. You don't know whether you ever saw them at all?

A. No.

Q. Then you don't know the quality of them from your own knowledge?

A. These particular ones?

Q. That the sheriff seized, yes?

A. I never saw them, no, sir.

Q. Do you know whether they were fat or thin at the time of their seizure?

A. No.

Q. Or whether they were white-faces, Jerseys, or mixed blood?

A. No.

Q. Do you know whether they were beef cattle or milk variety?

A. No, sir.

MR. HEALEY: I object to the witness's testimony in view of the fact that he does not know the livestock.

Q. The question of value depends on the quality of the livestock?

A. Yes,

Q. Whether fat or thin?

A. I didn't hear.

Q. It also depends on the condition of the livestock?

A. Yes.

Q. Upon size and quality?

A. Yes.

MR. HEALEY: I object on the ground that he is not qualified.

THE COURT: I think it would be difficult to place a value upon cattle he has never seen.

MR. GALLAGHER: May I ask a few questions?

THE COURT: Yes.

MR. GALLAGHER:

Q. I will ask you when you got to the range in March you say you seen the cattle under the trust at that time?

A. Part of the cattle on the place, yes.

Q. About how many do you know the percentage of a hundred head?

A. I don't know, I didn't make a count.

Q. The cattle that were on the property that you said you saw in March, did you examine them as to their breeding, classification, and size?

A. Yes.

Q. Were those cattle later turned out of pasture and on the open range?

A. Most of them were, yes.

Q. You were on the ranch frequently after that?

A. Yes.

Q. I will ask you now when you returned to the ranch if these cattle that were in the pasture had been turned out on the range?

A. Yes.

Q. I will ask you how many cattle, about how many cattle you took possession of, constructively or actually passing to you as receiver and as reported to the court under this trust?

Objection overruled.

A. The list given me by the representative of the trustee that was in charge of the place at the time of the foreclosure.

Q. How many was that?

Objection overruled.

A. 141, I believe.

Q. And part of them were in the field and part--

A. Yes.

Q. And as to those you actually saw you are prepared now to state the size of the animals and the general classification?

A. Yes.

Q. Counsel asked you if you had seen the actual cattle that the Sheriff took charge of and you said you didn't. I will ask you if there were any other cattle other than the 141 head that passed to you under the trust?

A. No.

Q. Of the 141 head passing to you listed as on hand by the trustee, how many cattle generally were on the Skinner place when you got out there in March?

A. I didn't count them. Roughly about around 100 head.

Q. On the place altogether?

A. Yes.

Q. You didn't make a separate list of the trustee cattle at that time?

A. No.

Q. Did Skinner advise you how long those cattle had been turned off when you got there?

A. He said a few days.

Q. Where were they ranging at that time, did he say?

A. Near some lake, something like that—reservoir or lake?

Q. In Malheur County?

A. Yes.

Q. You were familiar with range conditions in Malheur County last year?

A. Yes.

Q. Would you be able to state from your acquaintance with the range conditions about the condition the cattle would be in, running on the range at that time; so that you can give an opinion as to their value in June when taken?

A. Range conditions over in Malheur County were somewhat different in different places. Generally during that time it was a little below normal.

Q. I am calling your attention to range conditions in the vicinity where these cattle naturally would range?

A. Below normal.

Q. When you said you knew the reasonable market value of the cattle, were you taking into consideration they would be in on the range at that time; also the breed and type of cattle you took over there?

A. Yes.

Q. Now I want to ask you again, if you can state the reasonable market value of this bunch of cattle in the vicinity in which they were turned upon the range, Malheur County, taking into consideration the cattle

as you knew them and the condition of the range, the condition the cattle would be as about the middle of June, the 21st of June?

MR. HEALY: I object on the ground that he is not qualified. He has no knowledge.

THE COURT: You say "this bunch of cattle". What cattle do you mean?

MR. GALLAGHER: I mean this band of cattle taken over by the Receiver, and which finally passed over to the possession of—

THE COURT: What cattle—how many?

MR. GALLAGHER: He took possession of 141. The Sheriff took possession of 131—138—

THE COURT: Does he know these are the same cattle the Sheriff took over.

MR. GALLAGHER: He testified there was 141 head decreed to him as Receiver. That is all the cattle Skinner had; he testified he didn't see them, the actual cattle after the Sheriff took them over—he didn't know —assumed those cattle were under the trust.

MR. HEALY: The witness stated that he didn't know whether they were the cattle taken over by the Sheriff or not.

THE COURT: That is the difficulty in permitting him to answer. He doesn't seem to know what the Sheriff did take over.

Q. Mr. Oakes, it is stipulated that the Sheriff took over in this case, 17 yearling steers, 20 two-year-old steers, 1 three-year-old steer, 42 cows and calves, 19 yearling heifers, 6 dry cows, 32 calves; it is also stipulated in the record that these were cattle assumed to be owned by William Skinner, taken by the Sheriff as the property of William Skinner. Now with that information I will ask you to say whether you saw, on any trips to the ranch in March, or afterwards, any of the cattle the Sheriff took over as the property of William Skinner?

A. I don't think there is any question but what I saw part of them. I didn't see them after the Sheriff took them.

Q. You never did see them after the Sheriff took them?

A. No, sir.

Q. But you would say you were familiar with the Skinner cattle before the Sheriff took them over?

A. Yes.

MR. GALLAGHER: I will renew my question.

THE COURT: The answer must be confined to cattle he saw himself. Cattle he had knowledge of himself.

Q. Will you give your best judgment as to the market value of the cattle, taking them class by class —take the yearling steers?

A. Twenty-five dollars.

Q. Per head?

A. Yes.

Q. Two-year-old steers?

A. Forty dollars.

Q. One three-year-old steer?

A. I wouldn't hardly know. A three-year-old steer would probably run forty-five or fifty dollars.

Q. Cows and calves?

A. About forty dollars.

Q. Cow and the calf?

A. Yes.

Q. Yearling heifers?

A. Twenty dollars.

Q. Dry cows?

A. Between twenty-five and thirty dollars.

Q. Can you fix a figure so that we can compute?

A. Say twenty-five dollars.

Q. Have you taken these figures and computed the total amount of your estimate?

A. Yes.

Q. What would you say was the total computation you arrived at?

A. $3,235.00 I believe.

On cross examination the witness testified that he lived at Ontario, Oregon; that he was living there and had an office last year; that W. S. Skinner's ranch was in Jordan Valley; that this property is west of Jordan Valley town, that it is a large place; that the land on the Skinner ranch was under the mortgage foreclosure in which the witness was appointed receiver.

Q. Do you know whether or not Skinner had cer-

tain ranches leased from other parties with which this trustee had nothing at all to do?

A. I didn't at that time, no.

Q. You have since learned that Skinner did have other places leased?

A. Yes.

Q. What were those other places, if you know?

A. I do not believe I could name them.

Q. There was the Reservoir ranch, belonging to Summerville, leased by Skinner was there not?

A. That is what I have heard.

Q. The trustee had nothing to do with that ranch?

A. I couldn't say.

Q. You know, being appointed receiver, what property you had jurisdiction of?

A. That wasn't listed.

Q. Wasn't property that you had jurisdiction of, the Reservoir ranch, was it?

A. I didn't consider it so, no.

Q. Do you know whether it was or wasn't?

A. It wasn't listed as one of the assets I was supposed to take over.

Q. Were you ever at the Reservoir ranch?

A. No sir.

Q. You never went there in the summer or spring?

A. No sir.

Q. Did you ever send anybody over there?

A. No sir.

Q. In addition to the Reservoir ranch, didn't Skinner have the Star ranch, in Owyhee County, also leased

from Mr. Summerville?

A. I have heard that.

Q. That was your understanding?

A. Yes.

Q. You had no jurisdiction over the Star ranch?

A. No sir.

Q. Do you know whether or not Skinner—what ranches he was accustomed to run his cattle on in connection with—wasn't it the Reservoir ranch and the Star ranch, leased from Summerville?

A. I couldn't answer that.

Q. You haven't very much familiarity with the country?

A. I have been in Malheur County since 1910. I have been in Jordan Valley before this foreclosure suit —probably there ten or a dozen times.

Q. I am talking about the range country beyond?

A. No.

Q. Skinner had two range or summer ranches, the Reservoir ranch in Malheur County and the Star ranch in Owyhee County, which you as Receiver had no jurisdiction of?

A. No sir.

Q. You had no connection with those ranches that he operated cattle on in the summer time and spring?

A. I have no knowledge.

Q. You do not know?

A. No.

Q. On the 28th of March you went over to the Skinner ranch?

A. Yes.

Q. That is the place—that is not one of the places that Skinner had leased from Summerville?

A. No, that is property that he owned over there.

Q. That is the ranch that was included in the mortgage to the Equitable Trust Company?

A. Yes.

Q. When you got to the ranch, what time of day was it?

A. Before noon if I remember it.

Q. And who was there?

A. Kirt Skinner.

Q. W. S. Skinner was defendant in the action where you were appointed Receiver?

A. Yes.

Q. What conversation did you have with Kirt Skinner?

A. I handed him that paper and told him that the court had appointed me receiver and asked him to read it over.

Q. What did he say?

A. I don't remember that he said anything particularly right at the time, and then a little later he stated that for the present at least he would have to refuse to act under the order.

Q. That he would have to refuse to give you possession of the ranch?

A. Yes.

Q. What did you say?

A. I didn't answer.

Q. What did you do?

A. I went back to Jordan Valley and I believe I called Mr. Gallagher; I am not sure.

Q. Then what did you do?

He then went back to Ontario and left his man there, who stayed until he took sick and then was away for around two months and then came back. While he was sick he spent most of the time at Nampa under the doctor's care. The witness knew in addition to the W. S. Skinner stock the boys had certain stock not included in the property and over which he had no jurisdiction; that of the stock he saw on the 28th of March, some belonged to W. S. Skinner and some belonged to the boys; that he did not count the cattle at that time; that he examined some of the brands; there were two different brands.

Q. Mr. Kirt Skinner told you where the cattle were that you had come to look at?

A. He did.

Q. Where did he say they were?

A. As I remember it, it was the Reservoir Ranch.

Q. You had no jurisdiction over the Reservoir Ranch as you understood it.

A. No, sir.

Q. You were not entitled to possession of the Reservoir Ranch?

A. No, sir.

Q. Did you understand from Skinner that these cattle that you were supposed to take charge of were in a field on the Reservoir Ranch.

A. I don't think he said; I don't remember him saying that way, he said they were at the Reservoir Ranch.

Q. That was the 28th of March, wasn't it?

A. Yes.

The witness testified that it is proper to turn cattle out about the middle of March; that they were turned out earlier in 1931 than the year before.

Q. At any rate, you understood that the W. S. Skinner cattle were on the Reservoir Ranch; Kirt Skinner said they were in the field there?

A. There was nothing said whether they were in the field or outside.

Q. You assumed they were not in the field?

A. I don't remember forming any opinion either way.

Witness testified that he didn't go to Reservoir Ranch to look at any cattle; that he did not send anybody over there; that he didn't know how long the cattle remained at the Reservoir Ranch; that he didn't know which of the Skinner boys was at the Reservoir Ranch looking after the cattle; that he didn't know the circumstances under which the Skinner boys turned these cattle off the Reservoir Ranch; that he didn't know when they were turned on the range nor under what circumstances nor when nor by whom they were turned off the ranch.

Q. You don't know anything about it — do you know whether or not it was customary to summer these cattle in the neighborhood of the Star Ranch?

A. I do not know.

Q. That was their summer range?

A. I do not know.

Q. If turned on the range they would naturally go up around the Star ranch in Owyhee County?

A. I do not know.

Q. Where did you suppose they were going then?

A. I was not familiar, I couldn't say.

Q. You didn't go down to find out?

A. No sir.

Q. Or send anybody to find out?

A. No sir.

Q. You have since learned because these cattle were seized by the Sheriff of Owyhee County that as a matter of fact they did go in the vicinity of the Star Ranch in Owyhee County?

A. That is where they were taken, yes.

Q. Did you go over there to see them when they were seized by the Sheriff?

A. I did not.

Q. Did you send anybody over there?

A. No sir.

Q. Assuming, Mr. Oakes, that in March it was still necessary to have these cattle on feed or pasture for some little time, did you make arrangements to provide pasture for them?

A. I did not.

Q. You made a report about the first of July?

A. Yes.

Q. And the report you made was correct as near as you could tell?

A. Yes, as near as I knew.

CROSS EXAMINATION BY MR. HEALY CONTINUED:

Q. While these cattle which were seized by the Sheriff of Owyhee County in that county, while they were in Owyhee County, did you turn them into the county authorities for taxation purposes?

A. No, sir.

Witness stated he did not know whether or not they were assessed in that county; that he paid no taxes on the cattle in that county; that they were never assessed as far as he knew, not turned in to the state or county authorities for assessment purposes; that he did not know whether they had been assessed to Skinners in Owyhee County the year before; that after the sale in August he made arrangements for the Skinners to stay on the ranch; that the sheriff had made the sale in the foreclosure proceedings on the 22nd of August and witness had nothing to do with the sale.

Thereupon the following proceedings were had:

MR. GALLAGHER: It is stipulated that the judgment roll on the foreclosure suit in Malheur County, Oregon, may be used by both parties for such purposes as they see fit.

MR. HEALY: Do you want the whole judgment roll?

MR. GALLAGHER: Yes.

MR. HEALY: We are not offering—we have no objection to any part that has any relevancy.

THE COURT: Admitted.

Witness's attention was thereupon called to a part of the judgment roll which was an order bearing filing date of August 24, 1931.

Q. I call your attention to an order in the Circuit Court for Malheur County, which starts out this way: "This matter coming on for hearing upon motion of P. J. Gallagher"—that is Mr. Gallagher here now?

A. Yes.

Q (Continuing). "Attorney for the plaintiff and Ivan Oakes, Receiver appointed by the Court herein"—that was upon your application?

A. Yes.

Q. This goes on to say: "That it appearing that the personal property described in the mortgage in this case has not been sold, It is Ordered that the sale of the personal property be deferred until such time as said property can be conveniently gathered and presented for sale." Now what was this sale of personal property?

A. These cattle.

Q. This goes on to say: "It further appearing that said real property"—that is the Skinner ranch?

A. Yes.

Q (Continuing). "Sold to the Equitable Trust Company as trustee for the bondholders, the said Equitable

Trust Company desires the Receiver, Ivan Oakes, heretofore appointed, to be put in possession of said property"—that order was made at that time was it?

A. Yes.

Q. Under date of the 21st of August, 1931?

A. Yes.

Q. Why did you need an order putting you in possession if you were already in possession.

MR. GALLAGHER: I object to that as a conclusion on what appears herein the record. After the sale, the purchaser at the sale is entitled to possession, any may elect someone to take possession for him. Why he did it, would be a conclusion of the witness.

THE COURT: The Court made this order?

MR. HEALY: Made it on his application. I asked him why he made application for an order putting him in possession if he was already in possession of the ranch.

Q. You applied for this order, didn't you, and Mr. Gallagher?

A. Yes.

Q. Why did you apply for it if you were already in possession of the ranch?

MR. GALLAGHER: I object to that as incompetent, irrelevant and immaterial.

THE COURT: That presents a legal question. One may apply for an order for possession of property

in order to have the Court say finally whether it is a correct possession. He might be in possession temporarily, but he would still have the right to ask the court to put him in possession. That is customary.

MR. HEALY: I don't desire to argue with the Court on the subject.

THE COURT: You are merely asking the witness for a legal conclusion. He might have been in possession, and wanted the Court to confirm it.

MR. HEALY: He doesn't say so—is the objection sustained?

THE COURT: Yes.

Thereupon the following question was asked:

Q. I call your attention to this part of the order: "It is ordered and adjudged that the said Ivan Oakes, Receiver, be immediately put into possession; that the Sheriff of said County is hereby ordered and directed to remove the defendant W. S. Skinner and Ella Skinner, or persons claiming under them, from the premises, and placing Ivan Oakes in possession thereof."

THE COURT: I don't deny you the right to ask him whether or not he was in possession, actual possession, you may inquire on that.

The witness then testified that Skinners were on the place at the time the order was made; that they ran the irrigated lands and meadows and lived on the place; that the witness lived in Ontario; that the order of August 22 was made after the Sheriff seized the cattle

in Owyhee County; that after the court's order of August 22, he arranged with the Skinners that the Skinners harvested the hay crop, sold it, kept the money, did not deliver any part to the witness and sold the pasture and received the money for the pasture; that on August 22, the witness's employee, Kerchener, went out to the Skinner place with the Sheriff. He had been away at Nampa for several months during which time the witness had nobody at the place. The witness arranged with Skinners after August 22 to board his man there; that the witness did not know about a road between the Skinner Ranch and the Reservoir Ranch; that he understood there was such a road; he didn't know the distance between the ranches; that witness claimed to have no jurisdiction or right of possession over the Summerville Ranches, where these cattle were.

On redirect Examination, the following took place:

BY MR. GALLAGHER:

Q. Counsel asked you about what arrangements you had with the Skinners for raising the hay crop and disposing of it; what percentage did you get, if any?

Objection overruled.

Q. What are the facts as to the arrangements you had?

A. Skinner put up the hay crop and gave us 200 tons.

Q. Who bore the expense of putting up the hay?

A. Skinner.

Q. What was he to receive in addition to the balance

of the hay; what other crops did he get besides the hay?

A. Pasture, part of it.

Q. He received part of the pasture?

A. Yes.

Witness then testified that Skinner delivered to him 200 tons of hay; that these arrangements were made the first of July; that the Skinner family raised the hay crop and delivered 200 tons to the witness; that the witness had a man on the ranch, went there March 28, stayed a month and a half, became ill, and left, went back with the Sheriff on August 22 and remained there ever since. Witness's first knowledge that the cattle had been into Idaho was about July 1st; that he found out through Mr. Ben Hunt; the Skinners didn't tell him; that thereafter he went over to Silver City, had a conference with the Sheriff and shortly after that this case was filed; that he never gave Skinners or anybody else any permission to take the cattle out of Malheur County into Owyhee County; that he did not know they were moved or were going to be moved that William Skinner was not at the ranch when he went there in March the first time; that he saw the premises before he was appointed receiver in 1930; that he had gone all over the place, saw around a thousand head of cattle; that they were an exceptionally fine bunch of cattle, Durhams and some White-face Herefords, and a few Jerseys belonging to a third person, which never passed to him under the trust.

On Re-Cross Examination, the witness testified that the information about the number and kind of cattle

which he put into his report as of July 1st he obtained through another party, Mr. Stewart Fagan.

It was thereupon stipulated that the Reservoir Ranch was in Malheur County, Oregon.

It was further stipulated as follows:

MR. GALLAGHER: Counsel and I have agreed that I may introduce a copy of a letter I wrote to the Sheriff. I offer in evidence a copy of the demand made by the receiver through his attorney for the return of these cattle, dated July 28, 1931, carbon copy of a letter written by myself.

THE COURT: Any objections?

MR. HEALY: I object on the ground that it is not the kind of demand that the statute specifies, and I would like briefly to call the attention of the court to the reason for my objection. The Idaho statute—

THE COURT: I am familiar with that statute; demand has to be made on the Sheriff.

MR. GALLAGHER: Has to be made to the Sheriff.

THE COURT: I thought that was what counsel said.

MR. HEALY: It is not a verified demand. The statute requires that it be verified under oath.

MR. HEALY: I will read it to your Honor.

Statute read.

MR. HEALY: California has the same statute, and the California courts hold that unless the statute is complied with, the Sheriff has no authority under such a demand and if he releases a property upon such a demand be made unless it is in the form prescribed by the statute, he subjects himself to liability for the value of the property on the part of the demand creditor.

THE COURT: (After argument.) Overruled; the exhibit may be admitted. (This is plaintiff's Exhibit 2 and is as follows):

"July 28, 1931.

"Sheriff
Owyhee County
Silver City, Idaho.

Dear Sir:

"I understand that you are holding certain cattle in an attachment issued in the case of Dave Summerville -v- W. S. Skinner, which case is now pending in the district court of Owyhee County, Idaho.

"This will notify you that Mr. Ivan Oakes was appointed receiver in a certain suit in Malheur County, Oregon, wherein the Equitable Trust Company, a corporation of Portland, Oregon, is plaintiff and W. S. Skinner and others are defendants. He was so appointed on March 17, 1931. He immediately qualified and took possession among other things of the cattle you are now holding, being some 145 head of mixed range cat-

tle branded SS on the left side or hip. *These cattle* These cattle were placed upon the range in Malheur County, Oregon and Owyhee County, Idaho, by said receiver.

"Formal demand is now made upon you for the return to such receiver of all cattle of that description and brand, that you are now holding in your possession. Refusal to return these cattle will compell the said receiver to institute proceedings for the recovery of said stock.

Very truly yours,

Ivan E. Oakes, Receiver

PJG:CL By"

The judgment roll which was introduced by the plaintiff and marked plaintiff's Exhibit 1, contains a complaint in equity; an order appointing a receiver; a receiver's bond in the sum of $10,000; the sheriff's return showing service of the summons upon all of the defendants named therein; an order of default as to all of the defendants; the default of the defendants W. S. Skinner and Ella Skinner, being entered as of the 24th day of April, 1931; report of the receiver filed July 1, 1931, which exhibit insofar as it pertains to these cattle is as follows:

"That your receiver was appointed by an order of this court on the 17th day of March, 1931, thereupon qualified by executing and filing surety bond in the sum of $10,000, which was approved by this court, and by filing an oath as such receiver, and thereupon proceeded to take an inventory of the

personal property on the above described premises; that such inventory was taken by me on the 21st day of March, 1931.

"That at that time most of the cattle and horses covered by the trust herein and belonging to the defendants William Skinner and Ella Skinner, had been turned on the open range; that one Stewart Fagan, an agent and employee of the Sheriff, furnished me with an itemized statement of such cattle as follows:

"25 head of two-year-old steers; 18 head of one-year-old steers; 27 head of one-year-old heifers; 16 head of calves; 2 bulls; all branded SS on the left hip.

"Approximately 70 head of work horses and mares, and approximately 35 head of saddle horses, all branded wine glass, made thus on the left shoulder.

(Signed) IVAN E. OAKES
Receiver"

There is other property described in the report which is not pertinent to this case.

This judgment roll and the copy of the proceedings therein is entitled in the Circuit Court of the State of Oregon for Malheur County, Equitable Trust Company, formerly Lumbermen's Trust Company, of Portland, Oregon, a corporation, plaintiff, v. W. S. Skinner and Ella Skinner, husband and wife, Willis G. Thompson, and Lumbermen's Securities Corpor-

ation, defendants. The complaint recites the corporate nature of the plaintiff; that Ella Skinner and W. S. Skinner are husband and wife and are designated as mortgagors; that the defendant Securities Company is a corporation; that the mortgagors on March 1, 1922, made a certain indenture of mortgage to the plaintiff, describing among other things a certain lot of cattle consisting of from 650 to 700 head branded SS on the left hip, of which there were about 460 cows, 14 shorthorn bulls, 200 yearling steers; that said cattle were then located on the lands described in said mortgage; that the said complaint further alleged default in the payment of the bonds secured by said mortgage, and that there remained due and unpaid the sum of $75,000; that the said complaint contained the following paragraph relative to personal property described in this cause of suit:

> "That there remains on said premises at the present time a large number of horses and cattle of various kinds, ages, and classes, to wit, 200 head of cattle and 200 head of horses, and a large amount of farm machinery, household furniture equipment and supplies of various kinds and natures, and that the property subject to the lien of said mortgage or trust deed is entirely inadequate security for the protection of the holders of the bonds issued thereunder and now outstanding, and that, unless a receiver of said mortgaged property be appointed, the interests of this plaintiff and of the bondholders it represents will be greatly endangered and the value of the security which your plaintiff has for

its protection will be further greatly impaired and diminished, and that it is necessary for the protection of this plaintiff and of the holders of said bonds that a receiver be appointed in this cause of the mortgaged property and of the earnings, revenues, rents, issues, profits, and other income thereof."

Said judgment roll also contains a decree of foreclosure in which it is found that there is due, owing, and unpaid from the defendants to the plaintiff the principal sum of $75,000, attorney's fees in the sum of $2350, and other sums and amounts immaterial, and then contains this paragraph:

"That the said receiver so appointed has reported to this court, which report is now on file; that he has taken into his possession and now holds certain personal property in said report described, a more particular description of which is contained in said report, which is hereby referred to. It is therefore ordered, adjudged, and decreed that all the real and personal property described in said indenture and which is now subject to the lien of said trust deed, be sold to the satisfaction of said judgment; that in making said sale, it is deemed for the best interests of all the parties that the personal property be sold separately upon the premises hereinafter described."

Thereafter, the court made an order confirming said sale, in which it was recited that the real property had been sold, and confirming the sale of said real property; that in said proceeding there was on the 24th of

August made and entered an order on which counsel on cross examination interrogated the witness Oakes, which order is in words and figures as follows, to wit:

"This matter coming on for hearing upon the Motion of P. J. Gallagher, attorney for the plaintiff, and Ivan E. Oakes, the Receiver appointed by order of Court herein, and it appearing from said Motion that a sale of the real property has been held pursuant to the execution in this case and that upon the sale of said real property there was not sufficient money realized to satisfy said judgment and that at the present there is substantial deficiency as a result of said sale.

"And it further appearing that the personal property described in the mortgage in this cause has not been sold for the reason that said property consists in part of horses and cattle, which are now grazing on the public domain and it would be impossible to gather said horses or cattle, owing to the scarcity of water on the public range.

"It is therefore ordered that the sale of said personal property be deferred until such time as said property can be advantageously gathered and presented for sale and that the receiver continue in possession of said personal property and care for the same.

"And it further appearing that at the sale of said real property it was sold to the Equitable Trust Company as Trustee for the bondholders and the said Equitable Trust Company desires the receiver Mr. Ivan E. Oakes, heretofore appointed to be put into possession of said property.

"It is therefore ordered and adjudged, that the said Ivan E. Oakes, as Receiver be immediately put into possession and that the sheriff of this county is hereby ordered and directed to remove the defendants W. S. Skinner and Ella Skinner, and all persons claiming by, through or under them, from said premises, and to place said Ivan E. Oakes in possession thereof to hold until there is redemption of said premises according to law or until the further order of this court.

"Dated this 22nd day of August, 1931.

W. W. WOOD

Circuit Judge"

Said judgment roll and exhibits contained therein shows that the complaint was filed in the Circuit Court of Malheur County on March 17, 1931; that the bond of the receiver was filed on March 18, 1931; order appointing receiver was filed on March 17, 1931, which order among other things recites; that Ivan E. Oakes was appointed receiver of all the assets and lands of W. S. Skinner and Ella Skinner covered by the trust deed including all of the real, personal, and mixed property of every kind and nature. That this receiver gave a bond in the sum of $10,000.00. That the receiver be and is authorized, empowered and directed to take immediate possession of all and singular of the real and personal property described in such deeds of trust; To exercise the powers usually exercised by receivers, that the defendant Skinners, his agents and employees, persons claiming under them, are ordered,

commanded and directed to turn over to the receiver the possession of all property, real and personal, then in their hands and under their control and that the defendant Skinners be restrained from transferring, selling or disposing of said property or from distributing or in anywise interferring with the receiver in his possession, control or operation. That the receiver be further empowered to institute and prosecute such suits as may be necessary in his judgment to protect the trust therefore vested in him, and that the receiver at quarterly periods thereafter file a report with the court.

That thereafter the plaintiff called his witness, H. Y. Blackwell, who testified that he resided in Portland, Oregon, that he had been engaged in the cattle business, buying and selling, all through Malheur County, Eastern Oregon and Western Idaho; that he was so engaged in June, 1931, and that he was then buying beef cattle on orders.

That in 1908 he had bought the Skinner cattle and that since that time he had seen them come on the market; He could not say how many years he had seen the Skinner cattle on the market; that he was in the Jordan Valley country three or four years ago and saw some of them on the range and saw them in the feed-lot three or four years ago; that he is familiar with the range conditions in the southern part of Malheur County; that it got pretty dry during the months of July and August of 1931.

Q. Now in this controversy there is involved a bunch

of cattle classified as follows: 17 head of yearling steers, 20 head of two year old steers, 35 head of cows and calves, 19 yearling heifers, and some dry cows. Now taking into consideration your knowledge of the range last year, and the market condition for cattle of this class, and the type of cattle you have heard described here, and as you know them, what would you say was the reasonable market value of those cattle on the range in the vicinity of Jordan Valley about the middle of June last year.

A. I put up some cattle in June, $30 for yearlings—

Q. Yes or no?

A. Yes about $30 for yearlings—

THE COURT: Yes or no.

THE WITNESS: Yes.

Q. Now then will you give the market value of that group of cattle by classes as outlined to you?

MR. HEALY: I object to that as a conclusion of the witness and no proper foundation laid to show knowledge of the conditions, weight, etc., of these particular cattle, or any of the conditions that go to the question as to what these cattle were worth on the market.

THE COURT: He would have to have knowledge of these particular cattle in order to give the market value.

MR. GALLAGHER: The witness saw the band

in the winter two years ago. He knows the water conditions and the range conditions.

THE COURT: What condition were they in about the time of the alleged taking. He said he saw the cattle two years previous to that. They might have been in different condition two years afterward. They might have been in poorer condition or better condition.

Q. Were you in the Jordan Valley country last summer?

A. No sir.

Q. Were you in the Malheur country where range conditions were similar to the Jordan Valley country?

A. Yes, around Juntura.

Q. Have you ever seen the Skinner cattle recently as two years ago now.

A. Two years ago this winter was the last.

Q. This winter, two years ago?

A. Yes.

Q. Fourteen months prior to this time alleged, June 1931—before that time how many—before the occasion that you saw them two years ago, how recently had you seen them before that so as to keep in touch with the kind of cattle they were?

A. I couldn't say just exactly. Three years ago I was out on the range, and we saw some of the cattle, saw them on the range, but I think that is three years ago in May, May or June.

Q. Did you see the Skinner cattle upon the feed lots the following winter after that?

A. Yes.

Q. That is the last you remember seeing them?

A. Yes.

Q. Did you see any cattle that Sam and Jim Hunt bought of the Skinner bunch last spring?

A. I saw quite a lot of those.

Q. That was after you saw them on the feed lot?

A. I saw some Hunt cattle last winter.

Q. Five or six months prior to June, 1931?

A. Yes.

Q. How many did you see at that time, and what class?

A. Mostly cows—I got a couple myself from Payette on feed.

Q. Those were part of the Skinner cattle that Jim Hunt brought down there?

A. He brought them to Bus Wilson and his partner. I didn't examine the irons. He told me they were the Hunt cattle—the Skinner cattle.

MR. GALLAGHER: He says he saw part of the same bunch of cattle four or five months prior to the middle of June.

THE COURT: He doesn't testify that he saw all of them—he only saw part of them. In the face of the objection, do you want the Court to pass upon the value of the entire cattle when this man only saw part of them. We do not know whether he saw ten or twenty head. Merely guessing at it. Haven't you got somebody that saw these cattle, and can give a

description of their condition, weight, etc.? Can't somebody give that? We are guessing too much—too much uncertainty.

MR. GALLAGHER: I think the jury is entitled to know generally the kind of cattle, breed, etc.

THE COURT: Yes, he can testify to that. I am not precluding you from doing that.

Q. State to the jury the general breed of the cattle, whether they be large, small or otherwise.

MR. HEALY: That is indefinite—what cattle do you refer to?

MR. GALLAGHER: The Skinner cattle, of course.

A. All I seen of the Skinner cattle was beef breed—Durhams and white faces.

Q. And were they heavy boned cattle?

A. I considered them a good class of cattle, a good class of eastern Oregon and Idaho cattle.

Q. Could you tell the market value in that territory that I described to you awhile back, of cows, Durhams, cross breed cows, that had been raised on the range in that vicinity, in Malheur County, and also to the market value of yearling steers and two year old steers of the same breed and the same blood or type that you knew these to be—

A. They were higher in June than later in the fall.

Q. Yes or no?

A. Yes.

Q. You may tell us as to the market value of the cattle, class by class.

MR. HEALY: I object to that as immaterial.

THE COURT: Overruled.

Q. What were the cows worth, and the calves?

A. I sold some cows and calves in the fall. The general price I figured was thirty-five to forty dollars.

Q. Now dry cows?

A. Thirty-five dollars?

Q. And the yearling heifers?

A. Yearling heifers and steers were selling from twenty-five to thirty dollars during the months of June and July.

Q. Two year old steers?

A. About forty dollars.

Q. Three year old steers?

A. There were very few three year old steers sold that month—they were sold later from four to five cents.

CROSS EXAMINATION

BY MR. HEALY:

Q. You never saw this particular bunch of cattle the Sheriff of Owyhee County seized, did you?

A. No.

Q. Do you know whether it was the tail-end of the Skinner bunch?

A. I don't know.

Q. You testified as to the value of the cattle, based upon a very good grade white face cattle?

A. Yes.

Q. Strictly beef cattle?

A. Beef type, white face and Durham.

MR. HEALY: We move to strike the testimony of the witness as to valuation, for the sake of the record. I think it is of no aid to the jury above showing as to what kind of stuff this was.

THE COURT: The difficulty is as to the cattle here in question—the witness said he saw part of them—we do not know whether he saw ten or a hundred head. He is testifying as to the value generally of cattle. Now to do that you have got to make comparison with cattle upon which he is giving the valuation. These cattle may have had different treatment. He said he saw a portion of them sometime prior to that time. We do not know whether their condition was the same as when he saw them—whether they decreased in weight or increased. You have to guess at it.

MR. GALLAGHER: I think that is covered by the fact that they were range cattle—he is only testifying as to the kind of cattle he saw, and all the cattle he saw were of good grade beef cattle. This witness's testimony is based upon that, and having seen parts of the same bunch of cattle as late as four or five months before that. It would be for the jury to say

how much weight to give his testimony based upon the opportunity he had to see the cattle.

THE COURT: He saw part, how much—are you going to guess as to the rest. He says he saw part. He doesn't say how many head. He doesn't say whether they were cows or calves or what. How are you going to figure value from that? It is impossible.

MR. GALLAGHER: He says he saw cattle of different grades.

THE COURT: It hasn't been proven that they were the same as the time he saw them.

MR. GALLAGHER: That would all depend upon range conditions. He is basing his testimony upon range conditions. That goes into the consideration of his estimate as to what the value was. I think we have proven that he was acquainted with parts of this particular brand of cattle. He saw part of them a few months before.

THE COURT: You say you saw part of them how many did you see?

THE WITNESS: Two hundred cows that Wilson and his partner bought.

THE COURT: In what condition?

THE WITNESS: In fair condition they were.

THE COURT: You said you saw some a few

months before the seizure?

THE WITNESS: Sometime before—I saw them in the winter. I was through that country two or three times during the winter.

THE COURT: You are giving your opinion as to two hundred head?

THE WITNESS: Yes.

THE COURT: I will limit it by that, unless you show the cattle were in the same condition, all of them, as the time he saw them—connect it up.

MR. GALLAGHER:

Q. As to the respective condition of the cattle—can you say whether or not these cattle, having been turned upon the range in the south part of Malheur County, or Jordan Valley, whether or not they would be in better condition in June than the condition you saw them in in the winter?

A. I do not think so, because it was winter and they were on feed.

Q. Did you take into consideration, in making your estimate of the value, the fact that these cattle on the range would not be in as good condition as you saw them in the field?

A. What was the question?

Q. Did you take into consideration the fact that these cattle would not be in as good condition as when

you saw them in the pasture, assuming that the range would not be good?

A. They wouldn't be as good condition as the cattle on feed.

Q. Are you making that allowance in putting the price on them?

A. Certainly.

Q. In your estimate you are assuming that cattle on the range would not be as valuable as those in the feed lot or pasture?

A. The estimate that I put on the class of cattle were prices that they were sold at during the months of June and July.

Q. Off the range?

A. Yes.

Q. You take that difference into consideration when you put that market value on the range cattle?

A. Yes, about the price they were selling at at that time.

MR. HEALY: Has the Court ruled?

THE COURT: I have limited it to the two hundred head he saw.

MR. HEALY: Those were not identified as being cattle we have anything to do with.

THE COURT: He saw two hundred head four months after they were seized. The only opinion he

can give would be as to those he saw.

RE-CROSS EXAMINATION

BY MR. HEALY:

Q. Where were the cattle branded and how were they branded?

A. I didn't examine the brands.

The witness thereupon testified that he understood that the Skinners had two different brands; that he didn't know which was which; that he was not looking at brands; that he didn't see any of the cattle that were sold in Idaho; the cattle he saw were in Idaho; that he saw, but he didn't pretend to testify or give value of any cattle that the Sheriff seized in the case.

MR. HEALY: I renew the motion, for the sake of the record.

THE COURT: I will make the same ruling I made a minute ago.

MR. GALLAGHER: That is the plaintiff's case.

MR. HEALY: Just a minute—may it be stipulated that the writ of attachment under which the defendant Sheriff seized the cattle was issued in the District Court of—

MR. GALLAGHER: I presume so—I haven't examined the record.

THE COURT: Does plaintiff rest?

(Attorneys consult.)

MR. HEALY: It is stipulated that the writ under which the Sheriff seized the cattle was issued out of the District Court of Owyhee County in the state of Idaho in the case of Summerville, plaintiff vs. W. S. Skinner, defendant.

THE COURT: Very well. Does plaintiff rest?

MR. GALLAGHER: We rest.

MR. HEALY: I would like to make a motion for non-suit.

THE COURT: Very well. Discuss briefly your authorities. I will excuse the jury for a few minutes.

Whereupon the jury was excused, and the following motion made:

MR. HEALY: The defendant moves that the plaintiff be non-suited, and dismissal entered, upon the ground and for the reason that the proof shows that plaintiff has no capacity to sue in the courts of this state, inasmuch as he has neither title to the property under the Oregon law or the order of the court appointing him, nor had actual possession of the property, either in the State of Oregon or the State of Idaho, and second, on the ground that the action against the Sheriff, being an action in replevin, will not lie, in the United States Court to take property from the possession of a state court. We have a number of authorities. It was also urged by counsel for defendant in

support of his motion that the demand made on the Sheriff was not in compliance with the statute, because not verified by claimant.

Whereupon, after argument of the motion by both counsel, the following proceedings were had:

THE COURT: I will have to grant the motion for non-suit upon the ground that the proof is insufficient to initiate the liability on this hearing. Call the jury in, and I will grant the motion.

MR. GALLAGHER: May I have an exception, your Honor?

THE COURT: Yes.

(Jury recalled.)

THE COURT: Gentlemen, a motion for non-suit has been made in this case by the defendant, in which the defendant asserts certain propositions of law which he claims is applicable to the evidence—that the evidence is insufficient to warrant a recovery. The court has reached the conclusion under the law that the evidence is insufficient to submit the case to you. For that reason the motion for non-suit is granted, and you are discharged from further consideration of the case.

MR. GALLAGHER: It is stipulated that I might withdraw this original file.

THE COURT: It may be done.

MR. GALLAGHER: At this time counsel for

the plaintiff excepts to the ruling of the court granting a non-suit in this case.

Forasmuch as the matters above set forth do not fully appear of record, the defendant tenders this, his bill of exceptions, and prays that the same may be signed and approved by the Judge of this Court.

DATED June 27, 1932.

P. J. GALLAGHER,
Attorney for Plaintiff and Appellant.

The foregoing Bill of Exceptions was filed on the .....day of June, 1932, within the time allowed for filing the Bill of Exceptions by order of the United States District Court for the District of Idaho, Southern Division, dated June 17, 1932, extending the time to July 15, 1932.

CHARLES C. CAVANAH,
United States District Judge for the District of Idaho, Southern Division.

(Title of Court and Cause.)

STIPULATION

Filed July 2, 1932

IT IS HEREBY STIPULATED by and between the attorneys for the respective parties that the

foregoing Bill of Exceptions contains all the evidence given and proceedings had on the trial of this action; that it is correct in all respects; that the same may be approved, allowed, settled, and ordered filed and made a part of the record herein by the Honorable Charles C. Cavanah, the judge who presided at the trial of said cause, upon the filing of this stipulation without further or other notice to defendant or his counsel.

P. J. GALLAGHER,
Attorney for Plaintiff.

WM. HEALY,
Attorney for Defendant.

(Title of Court and Cause.)

ORDER

Filed July 2, 1932.

This matter coming on for hearing upon the motion of the appellant for an order settling and approving the bill of exceptions tendered herein and the parties by their respective counsel, having heretofore stipulated that the foregoing bill of exceptions so tendered contains all of the evidence given, and proceedings had on the trial of this action and further stipulated that the same is correct in all respects and that the same may be approved, allowed and settled, and an order filed with-

out further notice to defendant or his counsel, and the said stipulation being filed herein be a part of the records of said cause based thereon and upon the records and files of said cause,

It is therefore ORDERED and CERTIFIED that the plaintiff's bill of exceptions contains all of the evidence given or offered on the trial of the cause of Ivan E. Oakes, as Receiver v. Ben Lake, Sheriff of Owyhee County, Idaho, and correctly shows all of the proceedings had upon said trial, and that said bill of exceptions is correct in all respects and is hereby approved, settled, and made a part of the records herein.

Dated at Boise, Idaho, this 2nd day of July, 1932.

CHARLES C. CAVANAH,

District Judge.

(Title of Court and Cause.)

STIPULATION

Filed July 2, 1932.

IT IS HEREBY STIPULATED by the parties to this cause that plaintiff's Exhibit 1 may be omitted from the Bill of Exceptions and sent by the Clerk of the trial court direct to the United States Circuit Court of Appeals in its original form; and further, that the

said Exhibit 1 need not be printed in the record. This agreement is made in conformity with an order of the trial court by the presiding judge that such exhibit shall be omitted from the record and sent direct by the Clerk of the trial court to the Circuit Court of Appeals.

P. J. GALLAGHER,
Attorney for Plaintiff.

WM. HEALY,
Attorney for Defendant.

(Title of Court and Cause.)

ORDER.

Filed July 2, 1932.

Upon the foregoing stipulation between the attorneys for the respective parties,

IT IS ORDERED that plaintiff's Exhibit 1 be omitted from the Bill of Exceptions and that it be sent by the Clerk of the trial court direct to the United States Circuit Court of Appeals in its original form; and further, that the said Exhibit 1 be not printed in the record.

DATED July 2nd, 1932.

CHARLES C. CAVANAH,
United States District Judge for the District of Idaho, Southern Division.

(Title of Court and Cause)

ASSIGNMENTS OF ERROR.

Filed July 2, 1932.

COMES NOW the plaintiff, by P. J. Gallagher, his attorney, and says that the judgment and order of this court, made and entered on the 10th day of February, 1932, directing a non-suit in said cause, and making and entering a judgment in favor of the defendant and against the plaintiff, and that the further order of this Court made on the 21st day of March, 1932, denying the plaintiff's petition for a new trial, are erroneous and unjust to the plaintiff in the following particulars:

I.

That the Court erred in granting defendant's motion for a non-suit made at the close of the plaintiff's testimony, on the ground that plaintiff had no legal capacity to maintain the action.

II.

That the Court erred in granting defendant's motion for a non-suit made at the close of plaintiff's testimony on the ground that the demand made by plaintiff for the return of the cattle was not verified.

III.

That the Court erred in denying defendant's motion for a new trial.

WHEREFORE, plaintiff prays that said judgment be reversed and that the United States Circuit Court of Appeals for the Ninth Circuit remand said cause with instructions to grant the plaintiff a new trial.

P. J. GALLAGHER,

Attorney for Plaintiff.

(Title of Court and Cause.)

CITATION ON APPEAL.

Filed July 2, 1932.

UNITED STATES OF AMERICA,
DISTRICT OF IDAHO, SOUTHERN DIVISION.
ss.

TO BEN LAKE, AS SHERIFF OF OWYHEE COUNTY, IDAHO, GREETING:

WHEREAS, Ivan E. Oakes, as Receiver, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of nonsuit and directed verdict rendered in the District Court of the United States for the District of Idaho, Southern Division, on the 11th day of February, 1932, and also appealed from the order of the above-entitled Court made and entered on the 21st day of March, 1932, denying the petition of the said Ivan E. Oakes for a new trial of said cause, and has given the security required by law, you are therefore hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof to show cause, if any there be, why the said judgment should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Boise, Idaho, in said District, this 2nd day of July, 1931.

CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause)

PRAECIPE FOR TRANSCRIPT OF RECORD.

Filed July 2, 1932.

TO THE CLERK OF THE ABOVE COURT:

Please prepare a certified copy of the following records and papers and incorporate them into the transcript on appeal of this case, to-wit:

1. Amended Complaint.
2. Answer to Amended Complaint.
3. Bill of Exceptions.
4. Judgment.
5. Motion for a New Trial.
6. Order Overruling Motion for New Trial.
7. Petition for Appeal.
8. Assignments of Error.
9. Order Allowing Appeal and Fixing the Amount of the Appeal Bond.
10. Bond on Appeal.
11. Citation.
12. All orders Extending Time for Filing the Printed records and Docketing the Cause in the Circuit Court of Appeals, and all orders for settling and filing Bill of Exceptions.
13. Certificate of the Clerk.

P. J. GALLAGHER;
Attorney for Plaintiff-Appellant.

(Title of Court and Cause)

CERTIFICATE OF CLERK.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 84 inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit as requested by the Praecipe filed herein.

I further certify that the cost of the record herein amounts to the sum of $101.30 and that the same has been paid by the appellant.

Witness my hand and the seal of said Court this 30th day of July, 1932.

W. D. McREYNOLDS,
Clerk.

(Seal) By DOROTHY G. WYLIE,
Deputy.

No. 6909

United States
Circuit Court of Appeals
For the Ninth Circuit

IVAN E. OAKES, as Receiver,

Appellant,

vs.

BEN LAKE, as Sheriff of Owyhee County, Idaho,

Appellee.

Upon Appeal from the District Court of the United States in and for the District of Idaho, Southern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit: the September Term, A. D. 1932 of the United States Circuit Court of Appeals for the Ninth Circuit, held at the Court room, in the City of Portland, in the State of Oregon, on Wednesday, the fourteenth day of September in the year of our Lord One Thousand Nine Hundred and Thirty-two.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable JEREMIAH NETERER, District Judge.

[Title of Cause.]

ORDER OF SUBMISSION.

ORDERED above cause argued by Mr. Geo. B. Guthrie, counsel for appellant, and by Mr. Wm. Healy, counsel for the appellee, and submitted to the Court for consideration and decision, with leave to counsel to file further briefs 10 x 10.

At a stated term, to wit, the October Term, A. D. 1932 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court room thereof, in the City and County of San Francisco, in the State of California, on Monday, the ninth day of January in the year of our Lord One Thousand Nine Hundred and Thirty-three.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable FRANK H. NORCROSS, District Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE.

By direction of the Court, ORDERED that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk and that a decree be filed and recorded in the minutes of this Court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS.

Upon Appeal from the District Court of the United States for the District of Idaho, Southern Division.

Before: WILBUR and SAWTELLE, Circuit JJ., and NETERER, District J.

SAWTELLE, Circuit Judge:

Some years prior to this proceeding, W. S. Skinner and his wife executed a deed of trust mortgaging certain real and personal property situate in Malheur County, Oregon. The personal property thereunder included a band of cattle numbering 141 head and bearing a certain brand, and is the property here in controversy. Default was made by the mortgagors and the property was turned over to the trustee under the deed of trust in a foreclosure suit. At the same time, March 17, 1931, appellant was appointed received of the property by an order of the State Court of Oregon in which the foreclosure proceedings were had. The order appointing the receiver recites that he is "authorized, empowered, and directed to take immediate possession of all and singular the property, both real and personal described in or subject to the said mortgage or deed of trust." The cattle were left on the ranch of the Skinners, the defaulting mortgagors, and were run with other cattle there. It is claimed that the cattle were in the charge of an agent of the receiver on the Skinner ranch. However this may be, in June, 1931, without the knowledge or consent of the receiver, the cattle crossed over the boundary line of Oregon into Owyhee County in the State of Idaho, and about July 1, 1931, while in the latter place, the band were seized by appellee, sheriff of Owyhee County, and defend-

ant below, under an attachment suit brought in the Idaho State Court by one Summerville against W. S. Skinner. After a demand by the receiver on the sheriff for the return of the cattle, the receiver instituted this proceeding in claim and delivery in the United States District Court for the District of Idaho.

At the conclusion of the testimony on behalf of the receiver, the Court granted a motion for nonsuit. The motion was on the following grounds:

> "The defendant moves that the plaintiff be non-suited, and dismissal entered, upon the ground and for the reason that the proof shows that plaintiff has no capacity to sue in the courts of this state, inasmuch as he has neither title to the property under the Oregon law or the order of the court appointing him, nor had actual possession of the property, either in the State of Oregon or the State of Idaho, and second, on the ground that the action against the Sheriff, being an action in replevin, will not lie, in the United States Court to take property from the possession of a state court. We have a number of authorities. It was also urged by counsel for defendant in support of his motion that the demand made on the Sheriff was not in compliance with the statute, because not verified by claimant."

The correctness of the ruling on the motion for nonsuit is challenged here.

We believe that the judgment must be affirmed, on the ground, as stated in the motion for nonsuit, that the receiver had no capacity to sue in the Court below.

Since the decision of the Supreme Court in Booth vs. Clark (1854), 17 How. 322, 15 L. Ed. 164, the rule has been recognized that, in the absence of title in a receiver, either by conveyance or by statute, he will not be permitted to sue in a foreign jurisdiction, either as a matter of right or as a matter of comity. "The reason of the rule is that the legal title to the property is not in the receiver. All the rights in the property which the receiver has are by reason of the sovereign power through the courts taking custody of the property and making the receiver the representative of this sovereign power. This sovereign power does not extend beyond the confines of the state in which the receiver is appointed." Clark on Receivers, 2nd Ed., Vol. 1, § 591 (d).

In Lion Bonding Co. vs. Karatz (1923), 262 U. S. 77, 87, the Supreme Court said:

> "As Minnesota receivers merely, Hertz and Levin had no rights whatever in Nebraska. The general rule that a receiver cannot sue in a foreign jurisdiction applied. Great Western Mining Co. vs. Harris, 198 U. S. 561. The express authorization (contained in the order of appointment) to apply for aid to other courts could not aid them in this respect. Sterrett vs. Second National Bank, 248 U. S. 73."

In Sterrett vs. Second National Bank, 248 U. S. 73, 76, it was said:

> "The question presented for our consideration is whether the receiver appointed in the [Alabama] chancery court is authorized to sue in the federal court for the recovery of such property.
>
> "Since the decision of this court in Booth vs. Clark, 17 How. 322, it is the settled doctrine in federal jurisprudence that a chancery receiver has no authority to sue in the courts of a foreign jurisdiction to recover demands or property therein situated. The functions and authority of such receiver are confined to the jurisdiction in which he was appointed. The reasons for this rule were fully discussed in Booth vs. Clark, and have been reiterated in later decisions of this court. Hale vs. Allinson, 188 U. S. 56; Great Western Mining Co. vs. Harris, 198 U. S. 561, 575, 577; Keatley vs. Furey, 226 U. S. 399, 403. This practice has become general in the courts of the United States, and is a system well understood and followed. It permits an application for an ancillary receivership in a foreign jurisdiction where the local assets may be recovered and, if necessary, administered. The system established in Booth vs. Clark has become the settled law of the federal courts, and if the powers of chancery receivers are to be enlarged in such wise as to give them authority to sue beyond

the jurisdiction of the appointing court, such extension of authority must come from legislation and not from judicial action. Great Western Mining Co. vs. Harris, supra, p. 577."

It is not contended that the receiver has title to the property either by virtue of his appointment or by force of local statute, but simply that he was thereby vested with "authority and dominion over the property." Granting the soundness of the contention that the receiver was entitled to the undisturbed possession of the property and assuming that he actually had such possession, and granting or assuming that he had the power to sue locally in replevin for an unlawful interference with his right of possession, nevertheless such right of possession did not vest him with the title necessary to sue in the Court below without an ancillary appointment therein; and he was not entitled to bring the suit as a matter of comity. Great Western Mining Co. vs. Harris, 198 U. S. 561, 576.

Appellant contends that certain decisions of this Court, notably The Willamette Valley, 66 F. 565, and Lewis vs. Clark, 129 F. 570, uphold the right of a receiver of a State Court to sue in a foreign jurisdiction. We think those decisions are in harmony with the decisions of the Supreme Court, and that they do not hold that a receiver may sue in the courts of a foreign jurisdiction in cases like the one before us. Undoubtedly, there are cases that support appellant's position, but they are in conflict with the rule as enunciated by the Supreme Court;

and it is needless to say we must follow the decisions of that Court.

In view of what has been said, it becomes unnecessary to discuss the other assignments of error.

The judgment is affirmed.

[Endorsed]: Opinion. Filed January 9, 1933. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 6909

IVAN E. OAKES, as Receiver, etc.,

Appellant,

vs.

BEN LAKE, as Sheriff of Owyhee County, Idaho,

Appellee.

DECREE.

APPEAL from the District Court of the United States for the District of Idaho, Southern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Idaho, Southern Division, and was duly submitted:

ON CONSIDERATION WHEREOF, it is now here ordered, adjudged, and decreed by this Court,

that the decree of the said District Court in this cause be, and hereby is, affirmed with costs in favor of the appellee and against the appellant.

It is further ordered, adjudged and decreed by this Court, that the appellee recover against the appellant for his costs herein expended, and have execution therefor.

[Endorsed]: Decree. Filed and entered January 9, 1933. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

Comes now Ivan E. Oakes, as receiver, appellant herein, by Geo. B. Guthrie, of his attorneys, and moves the Court for an order staying the issuance of the mandate in the above entitled cause to and until the 9th day of April, 1933, and if within such time appellant shall file with the clerk of the Supreme Court of the United States his petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, then such mandate shall be withheld and its issuance stayed until determination by the Supreme Court of the United States of such petition for a writ of certiorari.

The foregoing motion is made by appellant by reason of the fact that said appellant has applied to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit requesting the preparation of the record herein for the purpose of

filing in the Supreme Court of the United States a petition for a writ of certiorari herein, and to review the judgment herein.

GEO. B. GUTHRIE,
Attorney for Appellant,
Ivan E. Oakes, as Receiver.

United States of America,
District of Oregon.—ss.

I, Geo. B. Guthrie, of attorneys for appellant, Ivan E. Oakes, do hereby certify that I have on this 27th day of January, 1933, deposited in the United States Postoffice at Portland, Oregon, a true copy of the foregoing motion addressed to William Healy, Esq., Boise, Idaho, of attorneys for appellee, with postage fully prepaid.

GEO. B. GUTHRIE.

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE.

Upon application of Mr. George B. Guthrie, counsel for the appellant, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including March 1, 1933; and in the event the petition for a writ of certiorari to be made by the appellant herein be docketed in the clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is

to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR,
United States Circuit Judge.

Dated, San Francisco, California,
January 30, 1933.

[Endorsed]: Filed. Jan. 30, 1933. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing ninety-seven (97) pages, numbered from and including 1 to and including 97, to be a full, true and correct copy of the entire record, excluding original exhibits, of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office,

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 2nd day of February, A. D. 1933.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 10, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3384)

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Summary Statements of Matters Involved	1
Reasons relied on for Allowance of the Writ	3
Prayer for Writ	8
Brief in support of petition	9
Opinion of the Court below	9
Statement of jurisdiction	9
Statement of case	11
Specifications of errors	16
Summary of argument	18
Argument	20

Table of Cases

Bank of Midland v. Harris, 114 Ark. 344; (170 S. W. 67)	34
Barnett v. Kinney, 147 U. S. 476	28
Booth v. Clark, 17 How. (58 U. S.) 322	10, 17, 24, 26
Brownell v. Manchester, 1 Pick. (Mass.) 232	28
Cagill v. Wooldridge, 8 Baxt. (Tenn.) 580; (35 Am. Rep. 716)	4, 24, 26, 31
Case T. M. Co. v. Campbell, 14 Or. 460; (13 P. 324)	35
Chamberlin v. Wilson, 45 Iowa 149	28
Chicago B. & S. Co. v. U. S., 261 Fed. 266	3, 6, 24, 30
C. M. & St. P. Ry. v. Keokuk, etc., Co., 108 Ill. 317, (48 Am. Rep. 557)	5, 23, 25, 32
Chillicothe Furn. Co. v. Revelle, 14 F. (2d) 501	23
Cont. Nat. Bank v. Naylor, 39 Idaho 267 (228 P. 266)	36
Crapo v. Kelly, 16 Wall. (83 U. S.) 610	6, 27
Durfee v. Jones, 11 R. I. 558, (23 Am. Rep. 528)	29
Farmers L. & T. Co. v. Chi. & A. Ry., 27 Fed. 146	36
First Nat. Bank v. Yocum, 96 Or. 438, (189 P. 220)	35
Fogg v. Hebdon, 80 Miss. 750 (32 S. 285)	34
Gidding's Ex'rs v. Green, 48 Fed. 489	28
Goodrich v. Rochester T. Co., 160 N. Y. S. 454	34
Grant v. A. B. Leach Co., 280 U. S. 351	11

TABLE OF CASES—CONTINUED

Page

Great Western M. Co. v. Harris, 198 U. S. 561 ..... 16, 17
Hale v. Allinson, 188 U. S. 56 11
Harker v. Dement, 9 Gill. (Md.) 7, (52 Am. Dec. 670) 29
Harris v. Smith, 3 Serg. & R. (Pa.) 20 33
Harvey v. Lidvall, 48 Or. 558, (87 P. 895) 35
Hill v. Barton, 194 Mo. App. 325, (188 S. W. 1105) 28
Humphreys v. Hopkins, 81 Cal. 551, (22 P. 892) 6, 26
Jenkins v. Purcell, 29 App. D. C. 209, (9 L. R. A. (N.S.) 1074) 3, 6, 24, 25
Killmer v. Hobart, 58 How. Prac. (N. Y.) 452 24
Kirker v. Owings, 98 Fed. 499 34
Lion B. & S. Co. v. Karatz, 262 U. S. 77 ..... 11, 17
Lyon v. Russell, 41 App. D. C. 554, 559 ..... 24, 30
McAlpin v. Jones, 10 La. Ann. 552 4
McBride v. Oriental Bank, 200 Fed. 895 33
Merchants Bank v. Penna. Steel Co., 57 N.J.L. 336, (30 A. 545) .5, 30
Moore v. Mitchell, 281 U. S. 18 11
Moorhouse v. Donaca, 14 Or. 430, (13 P. 112) 35
Neppach v. Beauvais, 138 Or. 524, (7 P. (2d) 559) 35
Osgood v. Maguire, 61 N. Y. 524 34
Pond v. Cooke, 45 Conn. 126, (29 Am. Rep. 668) 4, 24, 25, 30, 31
Porter v. Davidson, 62 Fed. 626 16
Robertson v. Staed, 135 Mo. 135, (36 S. W. 610) 5, 7, 26, 30
Scott v. Elmore, 10 Hun. (17 N. Y. Sup. Ct.) 68 23
Sec. Trust Co. v. Dodd, Mead & Co., 173 U. S. 624 28
Somerset Coal Co. v. Diamond Steel Co., 224 Pa. 217, (73 A. 442).5, 26
State v. Rivers, 60 Iowa 381 (13 N. W. 73) 22
Sterrett v. Second Nat. Bank, 248 U. S. 73 17
The Willamette Valley, 66 Fed. 565 ..... 3, 6, 23, 25, 30
The Willamette Valley, 76 Fed. 838 4
Union Savings Bank v. Carnegie Trust Co., 37 App. D.C. 548, 551 24
U. S. v. Atlantic Coast Line, 206 Fed. 190 22
Utley v. Smith, 7 Vt. 154, (29 Am. Dec. 152) 28
Wilkinson v. Culver, 25 Fed. 639 27
Wilkinson v. Rutherford, 49 N. J. L. 241, (8 A. 507) 30
Woodhull v. Farmers Trust Co., 11 N. D. 157, (90 N. W. 795) 5, 7, 26, 30

Page

STATUTES CITED

Judicial Code, Sec. 24, 36 Stat. 1091 9
Judicial Code, Sec. 240, 43 Stat. 938 9
Oregon Code 1930, Sec. 54-207 34

OTHER AUTHORITIES

Alderson on Receivers, p. 760 24
Beale on Foreign Corporations (1904, W. J. Nagel, Boston) pp. 965, 966, 970, 971, 972, 973 26
Beale on Foreign Corporations, Sec. 791, p. 961 36
Goodrich Conflict of Laws, p. 445 (West Pub. Co. 1927) 25
High on Receivers, p. 161 24
Holmes: Common Law (1881) Little, Brown & Co., Lecture V, pp. 165-167, Lecture VI, pp. 241-243 ..... 21, 29
Story: Bailments, p. 280 29

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No._____

IVAN E. OAKES, as Receiver,

Petitioner,

vs.

BEN LAKE, as Sheriff of Owyhee County, Idaho,

Respondent.

PETITION FOR WRIT OF CERTIORARI:

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Ivan E. Oakes, a citizen of the State of Oregon, respectfully shows:

A—SUMMARY STATEMENT OF MATTERS INVOLVED

That herein, the Circuit Court of Appeals for the Ninth Circuit has held that one who had been duly appointed a managing and operating receiver of certain properties, including cattle, involved in a chattel-

mortgage foreclosure suit pending in an Oregon court of admitted jurisdiction, and who had, in Oregon, taken the cattle into his custody, control and possession, and who, by his bond as Receiver, is obliged to account for all properties coming into his hands as Receiver, has no right to bring his action for the repossession or value of said cattle in the United States District Court in Idaho, it appearing that, without his knowledge or consent, the cattle had passed from Oregon into Idaho, where they had been attached as the property of the chattel-mortgagor.

The matters involved are the property rights or title, of an Oregon receiver, to movable chattels under the facts related; and the personal right to possession of chattels by one who, as an Oregon receiver, within that State, had assumed control and taken custody thereof, and who is personally liable on his bond for property so taken into his hands, when, thereafter, as here, the chattels (cattle on the range) have passed from Oregon into Idaho as already related.

Generally, they involve the possessory or property rights of one who is a managing receiver of a business enterprise, to repossess himself or recover the value, in a foreign State, of those chattels which had been taken into his possession as such receiver within the appointing State, but which had thereafter passed into a sister State.

B—REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The following reasons are relied on by petitioner:

1. That the decision herein of the Circuit Court of Appeals for the Ninth Circuit is in conflict with decisions of the Circuit Court of Appeals in the Seventh Circuit and of the Court of Appeals of the District of Columbia, and with earlier decisions of its own, dealing with the same or kindred matter.

Thus in the Seventh Circuit it was held in *Chicago Bonding & Surety Co. v. United States* (1919) 261 Fed. 266, that (the case being so regarded) a Pennsylvania receiver, who had shipped goods from Pennsylvania into Illinois, might sue and recover damages in Illinois as the owner of the goods furnished and not as receiver of a chose in action belonging to the company in receivership.

Further, *Jenkins v. Purcell* (1907), 29 App. D. C. 209 allowed a Virginia receiver to intervene in, litigate and successfully claim his right to funds attached in the District of Columbia in an action brought by a creditor of the former owner of cattle which had been placed in the hands of the Virginia receiver in Virginia, who brought the cattle into Washington and sold them, the proceeds being the funds attached in the buyer's hands.

The question was similarly decided in the Ninth Circuit in *The Willamette* (1895) 66 Fed. 565, where

an Oregon receiver, managing and operating a steamship, which was seized on admiralty process in the Northern District of California, was permitted to appear and litigate in the foreign admiralty court. His right to take the vessel was denied since the libel was based on liabilities incurred by the receiver in his own operation, but his capacity to sue was not proscribed; and, later on, he was in the District Court permitted further to litigate, and to share in the distribution of the vessel's proceeds after sale, wherein his right as a foreign receiver to participate and litigate was resisted. (*The Willamette Valley* (1896) 76 Fed. 838, 852.)

2. Herein the court has decided important questions of general law in denying to a managing receiver of goods and chattels involved in a foreclosure proceeding and by him reduced to possession, the right or capacity to sue in a foreign state for their recovery or value when brought therein without his knowledge or consent, and denying that his possessory rights or title to such chattels will be there recognized; that such decision is probably untenable and is in conflict with the weight of authority.

For example, *McAlpin v. Jones* (1855), 10 La. Ann. 552, held that a Mississippi receiver might recover, in the Louisiana Courts, possession of four slaves stolen from him in Mississippi; in *Cagill v. Wooldridge* (1875) 8 Baxt. (Tenn.) 580, an Arkansas receiver was permitted to replevy cotton sent by him from Arkansas into Tennessee where it was attached by a creditor of the insolvent; in *Pond v.*

Cooke (1877), 45 Conn. 126, a New Jersey receiver, who had purchased iron with receivership money and had shipped it into Connecticut, was permitted to recover it from an attaching creditor of the insolvent; in *Chi. M. & St. P. Ry. v. Keokuk Packet Co.* (1884), 108 Ill. 317, a Missouri receiver recovered possession of a barge against an Illinois attaching creditor of the insolvent, it appearing that, in Missouri, the receiver had leased the barge to one who took it into Illinois and while therein relinquished its possession to the receiver; in *Robertson v. Staed* (1896), 135 Mo. 135, a Mexican railroad receiver prevailed in replevin against a Missouri sheriff who had attached a special railroad-car at the suit of an Illinois creditor of the railroad suing in Missouri, it appearing that the car had been brought by the receiver from the Republic of Mexico into Missouri; In *Woodhull v. Farmers Trust Co.* (1902), 11 N. Dak. 157, an Iowa receiver was allowed to recover possession of certain promissory notes brought lawfully by him into North Dakota, where the notes were attached by a North Dakota creditor of the insolvent; in *Somerset Coal Co. v. Diamond Steel Co.* (1909), 224 Pa. 217, a Delaware receiver had sent moneys from Delaware into Pennsylvania, which were attached in an action brought by a Pennsylvania creditor against the insolvent. Held that the moneys belonged to the receiver and the attachment was discharged. In *Merchants Bank v. Penna. Steel Co.* (1894), 57 N. J. L. 336, a Pennsylvania receiver, operating the business, sold and shipped goods from Pennsylvnia to a New Jersey

customer whose debt on account thereof and certain goods were attached in a New Jersey action brought by a Massachusetts creditor against the insolvent. Held, that the receiver had title and the attachment was discharged.

The federal cases of *The Willamette Valley*, 66 Fed. 565, *Chicago Bonding Co. v. U. S.*, 261 Fed. 266, and *Jenkins v. Purcell*, 29 App. D. C. 209, are in accord; and the important case of *Crapo v. Kelly* (1872), 16 Wall. (83 U. S.) 610, involving the possessory rights of a Massachusetts assignee in insolvency proceedings, relating to a vessel on the high seas, but attached by a New York creditor of the insolvent on its arrival in that state, is in harmony.

The only case found in support of the decision herein is *Humphreys v. Hopkins* (1889), 81 Cal. 551 (where a strong dissenting opinion was expressed by two of the justices).

3. That the legal capacity to sue in a federal court by one who is a foreign receiver, seeking to recover possession or the value of goods which had been by him taken into actual possession within the jurisdiction of the appointing state, but thereafter sent by him for a lawful purpose, or taken without his knowledge or consent, into a sister state and there adversely held as the property of another, presents a question of importance in federal jurisprudence, closely allied to if not genuinely a federal question, which has not been, but should be settled by this court.

This court has settled the law that a foreign receiver, in the absence of assignment or conveyance to him, or applicable statute vesting title in him, may not bring his action for recovery of property or the enforcement of a chose in action in the federal courts of a sister state, the property or property rights being *within the sister state;* but the property rights, "special property" of one who is a foreign receiver, and who has, *within the state of his appointment,* actually assumed management and taken possession of the goods and chattels of an insolvent or other former owner of receivership assets, which goods have thereafter been brought into a sister state, wherein such rights must be adjudicated, either by the receiver as such, or individually based upon his responsibility therefor, have not been settled by this court.

His title, which closely resembles that of a bailee, has been respected by some courts as akin to a judicially determined right entitled to full faith and credit. See *Woodhull v. Farmers Trust Co.,* 11 N. Dak. 157; also *Robertson v. Staed,* 135 Mo. 135, at 139, 140, holding the right to be one of law and not of comity and that "the order of the court and the subsequent possession thereunder vested in the plaintiff a special property—which authorizes him to maintain this suit."

The question is of first importance when consideration is given to the many business enterprises which are being operated by receivers in these times of stress. The decision herein would deny such receiver the right to sue in a federal court in a sister state, in

the absence of ancillary proceedings, for the collection of debts owing the receiver on account of goods sold and delivered by him, or for the recovery or restoration of goods and chattels sent by or taken from him into such sister state, or to sue for their value if converted, or for damages sustained through negligence while the chattels were in the sister state.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 6909, (IVAN OAKES, as Receiver, Appellant, v. BEN LAKE, as Sheriff of Owyhee County, Idaho, Appellee) and that the said judgment of the United States Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

IVAN E. OAKES, Petitioner,
By JAMES G. WILSON,
JOHN F. REILLY,
GEO. B. GUTHRIE,
P. J. GALLAGHER,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION

Opinion of The Court Below

The opinion of the Circuit Court of Appeals for the Ninth Circuit (Sawtelle J.) was filed January 9, 1933. It will be found in the *Transcript of Record* (R. 89-94). It is not yet in published form. No opinion was filed in the trial court.

Statement of Grounds of Jurisdiction

(*a*) The jurisdiction of this court is believed to be sustained under *Judicial Code,* Section 240, as amended by the Act of Feb. 13, 1925, 43 Stats. 938. The jurisdiction of the District Court below is laid under *Judicial Code, Section* 24, amended, 36 Stats. 1091, as a suit at common law where the matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars and is between citizens of different States.

(*b*) The date of the judgment sought to be reviewed herein is January 9, 1933. (R. 94, 95).

(*c*) The nature of the case and rulings below were such as bring this case within the jurisdictional provisions relied upon. The action brought in the District Court was based on diversity of citizenship, plaintiff (petitioner) appearing as an Oregon citizen, who had been duly appointed an Oregon receiver of certain cattle (R. 11, 12), had taken them into his possession (R. 13) and was entitled to their immediate possession at the time the action was filed

(R. 13), against defendant an Idaho citizen and sheriff who held the cattle on an Idaho attachment and withheld possession (R. 12, 14) notwithstanding plaintiff's demand for their return. Defendant (respondent) by his Answer admitted that the cattle had been attached by him (R. 22) and alleged that he held them on a writ of execution (R. 23) and further declared that plaintiff as an Oregon receiver, had no capacity to sue herein (R. 25). The evidence showed plaintiff's Oregon citizenship (R. 32) and the value of the cattle to be in excess of $3,000.00 (R. 42, 67, 68). Defendant's Idaho citizenship was admitted by his Answer (R. 21).

The trial court dismissed the action on motion for nonsuit, based on plaintiff's lack of capacity to sue in Idaho (R. 74) and the Circuit Court of Appeals affirmed the judgment (R. 94). Its opinion (R. 88-94) holds that your petitioner, as plaintiff below, being an Oregon receiver, had no capacity to sue in Idaho (R. 91, 93); that he was not vested with the "title necessary to sue in the Court below without an ancillary appointment" (R. 93); although it was granted or assumed that as an Oregon receiver he was entitled to the undisturbed possession of the property, had actually had such possession and had the right to bring a replevin in Oregon. (R. 93). The opinion holds this case to come under the rule of *Booth v. Clark*, 17 How. (58 U. S.) 322, and later cases in this court (R. 91, 92). However, in none of those cases had the receiver taken possession of the chattels within the appointing State, nor did the court

express its opinion on the legal effect of such possession, nor have we found any other decisions of this court which touch the facts herein found.

The issuance of the mandate has been stayed pending the determination of this Petition for Writ of Certiorari by an order of Judge Wilbur signed January 30, 1933 (R. 96).

(*d*) Cases believed to sustain the jurisdiction of this court to review on certiorari the matters involved are:

Hale v. Allinson (1902), 188 U. S. 56.
Lion Bonding & Surety Co. v. Karatz (1922), 262 U. S. 77.
Grant v. A. B. Leach Co. (1929), 280 U. S. 351.
Moore v. Mitchell (1929), 281 U. S. 18.

STATEMENT OF THE CASE

On March 1, 1922, W. S. Skinner and his wife conveyed, by mortgage-deed of trust, their certain real estate in Malheur County, Oregon, including livestock thereon, unto Lumbermens Trust Company (corporate name later changed to Equitable Trust Company), intended and designed to secure the payment of certain bonds issued by the mortgagors. (R. 59). The mortgaged cattle approximated 700 head. (R. 59). The mortgagors breached the conditions of and defaulted in the payments required by the deed of trust, and possession of the ranch and cattle was turned over to the trustee-mortgagee,

whose representative was in charge (R. 38) at the time a foreclosure suit was begun by the trustee in the Circuit Court of the State of Oregon for Malheur County, March 17, 1931 (R. 62). At that time, the Honorable W. W. Wood, Circuit Judge of the State of Oregon, appointed your petitioner as receiver; the Order of Appointment (R. 15-20) was based on the trustee-mortgagee's application and the showing made by its bill of complaint (R. 59) whereby your petitioner was made receiver of

> "all the assets, (etc.) covered by said mortgage or deed of trust, and all their property real, personal and mixed, of every kind and nature covered by said deed of trust." (R. 17).

This order further required an approved bond to be given and filed by the receiver conditioned

> "that he will well and truly account for any and all moneys and properties coming into his hands as such receiver." (R. 17);

and further that the receiver be

> "empowered and directed to take immediate possession of all and singular the property, both real and personal, described in or subject to the said mortgage deed of trust . . . " (R. 17);

and further that

> "the receiver in operating, conducting and managing the business of . . . W. S. Skinner and Ella Skinner, is . . . . authorized and empowered to manage and operate the said property and business of the defendants where the same is a going concern in such manner as

will, in his judgment, produce the most satisfactory results;" (R. 19).

NOTE: The Order of Appointment is printed in full (R. 15-20) as an Exhibit to the Complaint below. This was denied in the Answer for want of sufficient information and belief. It is part of the judgment roll—Plaintiff's Trial Exhibit 1—referred to in the Bill of Exceptions (R. 62).

The receiver qualified and filed his bond the next day, March 18, 1931 (R. 62) and on March 28, 1931, visited the ranch (about eighty miles distant from petitioner's home at Ontario, Oregon) and presented his credentials (R. 33, 45). He inspected the premises, including about 100 head of the cattle thereabouts (R. 33, 38); was given a list of the cattle by the trustee's representative (R. 38) showing 141 head to be subject to the receivership. The cattle were then on the range in Malheur County, Oregon (R. 38, 39). The receiver thereupon arranged for the continued maintenance of the ranch, put a man in charge of the premises (R. 34, 46), arranged with the Skinners for the production of hay, permitting them to remain on the ranch and to pay as rental therefor a share of the hay grown (R. 52-54).

The Oregon sheriff's return showed service made on all defendants, and the default of W. S. Skinner and Ella Skinner was entered *pro confesso* as of April 24, 1931 (R. 57).

Later in the summer of 1931, and while the receiver's man was ill, the mortgaged cattle crossed the Oregon-Idaho state line and into Owyhee County, Idaho. The Skinner home ranch is located westerly

from the town of Jordan Valley (R. 42), which in turn is very close to the Oregon-Idaho state line.

The mortgaged cattle were seized by the sheriff of Owyhee County in July, 1931 (R. 23, 54) upon their coming into the State of Idaho, and being in the vicinity of the so-called Star Ranch (R. 48). The attachment suit was brought in the District Court of the State of Idaho for Owyhee County by one David Summerville and against W. S. Skinner (R. 23, 74). In this action neither the receiver nor the trustee was made a party. The seizure was made and subsequent writ of execution was levied by the sheriff as upon cattle belonging to and in the possession of W. S. Skinner and his employees (R. 22, 23). The receiver did not know the cattle were to be moved out of Oregon, nor did he give anyone permission to take them out of Malheur County (R. 54).

The receiver Oakes, made a written demand for the cattle (R. 56), which was ignored by the sheriff, who took them on a writ of execution (R. 23); and thereafter this action was brought by Oakes, as receiver, against Lake, sheriff, respondent herein, as defendant, in the United States District Court for the District of Idaho, Southern Division, sitting at Boise. The action was laid in claim and delivery under the Idaho statutes. At the trial of the cause and at the conclusion of plaintiff's testimony defendant's counsel moved for a "nonsuit", which the court granted, and on February 11, 1932, gave respondent a judgment thereon (R. 25).

It appears from the record that the respondent's motion was thus stated:

> "The defendant moves that the plaintiff be nonsuited, and dismissal entered, upon the ground and for the reason that the proof shows that plaintiff has no capacity to sue in the court of this state, inasmuch as he has neither title to the property under the Oregon law or the order of the court appointing him, nor had actual possession of the property, either in the State of Oregon or the State of Idaho, and second, on the ground that the action against the Sheriff, being an action in replevin, will not lie in the United States Court to take property from the possession of a state court. We have a number of authorities." (R. 74).

Thereafter and on March 5, 1932, a Motion for a New Trial was filed in petitioner's behalf (R. 26), which was on March 21, 1932, denied (R. 27), and thereafter and on June 17, 1932, an Appeal was allowed to the Circuit Court of Appeals for the Ninth Circuit (R. 29, 30) where the same was argued and submitted September 14, 1932 (R. 87) and an opinion thereafter filed January 9, 1933 (R. 88-94) and Decree entered of even date (R. 94) affirming the judgment and decree of the District Court below.

In its opinion, the Circuit Court of Appeals said:

> "We believe the judgment must be affirmed, on the ground, as stated in the Motion for a Nonsuit, that the receiver had no capacity to sue in the Court below." (R. 91).

And further:

> ". . . Granting the soundness of the contention that the receiver was entitled to the undisturbed possession of the property, and assuming that he actually had such possession, and granting or assuming that he had the power to sue locally in replevin for an ulawful interference with his right of possession, nevertheless such right of possession did not vest him with the title necessary to sue in the court below without an ancillary appointment; and he was not entitled to bring the suit as a matter of comity. *Great Western Mining Co. v. Harris*, 198 U. S. 561, 576." (R. 93).

The Court did not pass on the other ground stated —that of interference with defendant's possession as that of a State court. This case, however, does not involve seizure by the U. S. Marshal, no claim and delivery bond was given, and no conflict is now involved. The case is, under code practice, in any event, to be supported as in trover. *Porter v. Davidson*, 62 Fed. 626.

This Petition for a Writ of Certiorari seeks to review and correct what is believed to be substantial error in the opinion and judgment of the Circuit Court of Appeals.

SPECIFICATION OF ERRORS

Petitioner believes the Circuit Court of Appeals has erred herein:

1. In denying petitioner the right or capacity to

sue for the repossession or value of the cattle in the District Court below when it appears or is assumed:

(*a*) That petitioner had lawfully reduced the cattle to his actual possession in Oregon, and had as of right a possessory property and title to them;

(*b*) That as a managing receiver, petitioner had assumed control and taken possession of the cattle, and was lawfuly engaged in the operation of the former Skinner properties;

(*c*) That petitioner is individually and personally responsible, and is obliged under the conditions of his bond to account for properties coming into his possession in the administration of his trust as did these cattle;

(*d*) That petitioner was appointed managing receiver on the application of the chattel-mortgagee, who at the time of appointment held lawful title to and possession of the cattle under the Oregon Statute and decisions, and whose possessory rights were, by the order of appointment and surrender of possession, vested in your petitioner as such managing receiver;

2. In holding this controversy to be governed by *Booth v. Clark,* 1 How. 322, *Lion Bonding Co. v. Karatz,* 262 U. S. 77, *Sterrett v. Second National Bank* (1918), 248 U. S. 73, and *Great Western Mining Co. v. Harris,* 198 U. S. 561, in none of which cases was there before the court for determination, nor was the law expressed touching the possessory

property rights or title of a foreign receiver to goods and chattels which had been reduced to possession within the appointing State and thereafter brought, sent or taken into a sister State where said rights were to be adjudicated.

SUMMARY OF ARGUMENT

The controlling question is simply stated. An Oregon receiver, thereunto authorized, takes possession of cattle in Oregon. Thereafter the cattle cross the boundary into Idaho and are attached by a stranger as property of the insolvent. May the receiver recover the possession or value thereof, in the federal court sitting in Idaho, either as such receiver or in his own right?

We contend that having taken possession and assumed responsibility in Oregon, the receiver has vested in him a property right or title good against the world, excepting only his duty to account to the beneficiaries of his trust; that as a keeper in fact (as well as in law) he has possessory property rights, and the possessory remedies of the law, replevin, trover, trespass and detinue are his against the attaching stranger; that in seeking to recover the cattle or their value, he is not acting as the arm of the Oregon court nor is he executing an order of that court; he has already obeyed the court's order by taking possession of the cattle and reporting them in his inventory. In Idaho, he seeks the *repossession* of the cattle as distinguished from possession, and acts because of his personal responsibility and authority.

He may be said, as an operating receiver, to be entitled as such to possession of the cattle on the range in the adjoining county and state, but, in any event, he has, by virtue of his factual keepership, what Justice Holmes, referring to bailments, prefers to call a "possessory property" in the cattle which is sufficient to support the right to sue.

The ascribed reason, lack of "capacity to sue" is probably inapposite. He has a personal "right to sue", and the trial court need not concern itself as to the "receiver's capacity" relating to actions; (the receiver's "capacity" was exercised and enforced in Oregon when actual possession was accomplished) its only concern is whether, on the merits, petitioner, as plaintiff below, was "legally entitled" to the cattle. As we read the federal decisions (excepting only the opinion below) and the various State cases (save only one in California) and the available authors of standard text-books and cyclopedias, and compare and apply the analogies of foreign guardians, administrators, sheriffs, and all manner of bailees, finders, pledgees and borrowers, we learn that a receiver's possession, lawfully acquired in one state, is respected, recognized and enforced as of right in all others.

Besides, petitioner was personally responsible on his bond—*ex contractu*—whatever his liability to his court as an officer might be; and that bonded liability, added to his right of possession, gives a further property interest which is recognized everywhere.

Still further, the trustee-mortgagee had a title to

the cattle, as grantee-vendee under the conveyance, and, by virtue of Oregon's statute and decisional law, as well as actual possession at the time of the receivership order; and the court's order made on application of the trustee-mortgagee in possession, together with actual and symbolic surrender of possession of the cattle to the receiver, vested the receiver with the right and title of the trustee-mortgagee as a further transferee. Such a transfer in fact conveys a right in the property to petitioner who is at least the equivalent of a responsible bailee in possession, whose rights are everywhere recognized and supported.

There is nothing in the history of possessory remedies which denies petitioner's right to recover his lost possession in another jurisdiction; there is every practical reason why such "possessory property" rights should be everywhere enforced.

The suggested remedy through ancillary appointments is barren; it is manifestly impossible as to workability even if it were available as a legal right rather than a discretionary remedy; it would be giving a stone when one asks for bread.

ARGUMENT

POINT A.—PETITIONER HAD ACTUAL LAWFUL POSSESSION OF THE CATTLE IN OREGON. SUCH POSSESSORY "TITLE" OR "SPECIAL PROPERTY" IS RECOGNIZED AS OF RIGHT IN A SISTER STATE.

The very early common law first recognized the right to recapture chattels taken from the keeper as in a *form of action available only to the actual pos-*

sessor; the true owner, unless he were also the actual possessor, had no remedy against the stranger who took them but perforce must look to the possessor. This right was so well established that by the 13th century the law was settled that the actual possessor from whom the goods were taken, or by whom they were lost, was given his right to recover from the stranger or taker *because he—the keeper—was liable to the true owner*—an inverted reasoning. (Curiously enough the law had its beginning in the taking or stealing of cattle by a stranger.) Thereafter, when the true owner was given his direct remedy against the third party, the possessory rights and remedies of the keeper (bailee) remained, as they do to this day, in trespass, trover, replevin, etc.; and, from ancient times, all bailees have been entitled to these possessory remedies. And even a wrongful possessor has sufficient title for a trover or replevin against a stranger. The so-called "special property" referred to in modern cases as the basis of replevin, etc., is no more than a right of possession which has been disturbed, and it is a procedural legacy from ancient forms of action where the established verbiage required the use of certain possessory pronouns, and thus some differentiation from "general property" was thought necessary.

As to the foregoing, see *"The Common Law"*; Holmes (1881), Little, Brown & Co., Lecture V, pp. 165-167 et seq. and Lecture VI, pp. 241-243 et seq., where, with profound analysis, the author demon-

strates the origin of these rights. We quote from p. 243:

> "I have explained the inversion by which a bailee's right of action against third persons was supposed to stand on his responsibility over, although in truth it was the foundation of that responsibility, and arose simply from his possession. The step was short, from saying that bailees could sue because they were answerable over, to saying that they had the property as against strangers, or a special property, because they were answerable over, and next that they could sue because they had a special property and were answerable over. And thus the notion that special property meant something more than possession, and was a requisite to maintaining an action, got into the law."

See *U. S. v. Atlantic Coast Line*, 206 Fed. 190, 202, stating the common law basis of bailee's right to sue because of his responsibility over.

Accordingly we find that a receiver's title will sustain an indictment for larceny from the "owner." *State v. Rivers* (1882), 60 Iowa 381. In that case a receiver of farm property visited the farm, notified the tenants of his appointment, arranged with them for handling the crops leaving them on the premises. It was held that the tenant's possession was the receiver's possession and that such possession of the receiver (as in case of a bailee or pledgee) vested in him a "special property" respecting which the larceny indictment could be laid as for ownership.

In *Scott v. Elmore* (1877), 10 Hun (17 N. Y. Sup. Ct.) 68, 72, it was said:

> "Personal property is usually held by mere possession without any further evidence of title, and may be passed from hand to hand in the same way, and it is well enough to allow the title to that kind of property to vest in a receiver without any assignment, because he can take actual possession of it and dispose of it for the purposes of the trust: but real property is held by a very different tenure . . ."

In *Chillicothe Furn. Co. v. Revelle,* 14 F (2nd) 501 (C. C. A. 8), J. Sanborn held a symbolic delivery (key to safety deposit box) as sufficient to pass title to a receiver.

(a) **The Federal Decisions**

In *The Willamette Valley,* 66 Fed. 565 (C. C. A. 9) Judge Gilbert said (p. 567):

> "But if, upon the other hand, the receiver should first obtain the possession of said property before an attempt is made to subject the same to the payment of domestic debts, or if, as in this case, in the prosecution of the business which he is appointed to conduct, or otherwise, he should take any of the property of his trust into the foreign jurisdiction, his possession and right of possession will be respected in the foreign tribunal, even as against the rights of creditors there residing, who may attempt to subject the same to the satisfaction of debts created before the receivership. Chicago, M. & St. P. Ry. v. Keokuk Northern

> Line Packett Co., 108 Ill. 317; Pond v. Cooke, 45 Conn. 126; Cagill v. Woolridge, 8 Baxt., 580; Kilmer v. Hobart, 58 How. Pr. 452."

In *Chicago Bonding Surety Co. v. U. S.*, 261 Fed. 266 (C.C.A. 7), Judge Baker said, answering the contention that a Pennsylvania receiver could not sue in Illinois for the value of goods delivered therein (p. 268):

> "The receiver was appointed before anything had been furnished by the (insolvent) company. Thereafter all correspondence and transactions were between Shields and the receiver. So, even if this be regarded as the receiver's suit, it is seen that he is suing as the owner of an obligation for goods sold and delivered by him, and not as receiver of a chose in action belonging to the company. High on Receivers, p. 161; Alderson on Receivers, p. 760."

In *Jenkins v. Purcell*, 29 App. D. C. 209, the court held (in a case where a Virginia receiver was possessed of cattle in Virginia which he brought into the District of Columbia and sold) that the receiver had a possessory title and could assert it in the District of Columbia courts and that nothing in *Booth v. Clark* was opposed to such right, citing the same cases found above in Judge Gilbert's opinion.

Later opinions of that court have confirmed the holding. See *Union Sav. Bank v. Carnegie Trust Co.* (1911), 37 App. D. C. 551, and *Lyon v. Russell* (1914), 41 App. D. C. 559, the latter expressly

touching on the receiver's title. There are a number of decisions in the District Courts in accord.

Holding to the contrary, we find the opinion herein to stand alone among the decisions of the different Circuit Courts of Appeals and to be in opposition to Judge Gilbert's opinion in this circuit. Clearly there is a conflict in the decisions.

(b) Other Decisions and Authorities

The cases already cited in our *Petition for Writ of Certiorari* at pages 4, 5, 6, supra, show the leading cases on the precise question, which were followed in *The Willamette Valley*, 66 Fed. 565, and *Jenkins v. Purcell*, 29 App. D. C. 209.

We also cite *Goodrich Conflict of Laws*, p. 445 (West Publishing Co., 1927):

> "A receiver is appointed to take charge of the property and business of a concern. He does so and in the course of running the business or disposing of the assets, he sends or takes some of the property to another state. If the possession of the receiver in another state is interfered with, it is clear that he may maintain an action in that state in defense of his right to possession. Further he may assert his right to possession as against a creditor who seeks to attach the property for a claim against the concern for whom the plaintiff was appointed receiver (citing Pond v. Cooke, 45 Conn. 126; 29 Am. Rep. 668; Jenkins v. Purcell, 29 App. D. C. 209, 9 L. R. A. (N.S.) 1074; Chicago, M. & St. P. Ry. Co. v. Keokuk

Northern Line Packet Co., 108 Ill. 317; Woodhull v. Farmers Trust Co., 11 N. Dak. 157, 90 N. W. 795; Somerset Coal Co. v. Diamond State Steel Co., 224 Pa. 217, 73 Atl. 442, 132 Am. St. Rep. 775; Cagill v. Woolridge, 8 Baxt. (Tenn.) 580, 35 Am. Rep. 716, Contra—Humphreys v. Hopkins, 81 Cal. 551, 22 P. 892). His right to possession for the purpose of carrying out the objects of his appointment will be recognized in the second state like any other duly vested right. In the language of the Missouri Court: 'It is generally ruled that, after a receiver has obtained possession of the property of the debtor within the jurisdiction of the court appointing him, such possession will be protected in whatever jurisdiction the property may thereafter be taken by the receiver. Robertson v. Staed, 135 Mo. 135, 36 S. W. 610, 33 L. R. A. 203, 58 Am. St. Rep. 569."

We also refer to Prof. Jos. H. Beale, an eminent authority on Conflict of Laws, who in his *"Beale on Foreign Corporations"* (1904, W. J. Nagel, Boston), analyzes *Booth v. Clark* (pp. 965, 966) and states that a foreign receiver may recover possession of goods fraudulently removed therein from the appointing state; and again (p. 970) shows the right to recover as a statutory successor (to the corporation); and (p. 971) as holder of title by voluntary (or common-law) assignment; and further (p. 972) as one "legally entitled" to the property, in which class he places indebtedness owing to the receiver himself as

in operating a business, judgments already secured in litigation prosecuted by him, and adds (p. 973):

> "And whenever a receiver gets actual possession of assets by order of court, the possession will not be divested in another jurisdiction." (Citing cases hereinabove relied upon.)

If we apply to the case at bar, the reasoning of Judge Coxe in *Wilkinson v. Culver*, 25 Fed. 639, (relating to title to judgments) we submit that petitioner herein showed or exercised his Oregon right of possession when he took possession and control of the cattle in Oregon. He exerted (or proved) his "title as receiver" at that time and acquired a new and different title as possessor and responsible keeper. He has no need of exerting or proving his right as receiver a second time.

(c) Analogies Are in Accord

The important case of *Crapo v. Kelly*, 16 Wall. (83 U. S.) 610, must not be passed by. Therein a Massachusetts State insolvency proceeding resulted in the appointment of an assignee by the court—not a voluntary assignment—by virtue of which order the assignee was held to take title to the properties within Massachetts without more, and this included title to a vessel on the Pacific ocean at the time. This vessel was attached by a New York creditor on arrival in New York (it had not returned meanwhile to Massachusetts) but the assignee's title was held entitled to prevail over the attachment. When we remember that title by such state assignment—as distinguished from

a voluntary or common-law assignment—is not entitled to recognition in a sister state when tested by a creditor therein (*Sec. Trust Co. v. Dodd, Mead & Co.*, 173 U. S. 624, 635; *Barnett v. Kinney*, 147 U. S. 476, 481), we believe the case should be determinative of a foreign receiver's title and the right to enforcement in a sister state, he being no less an officer of the court than such assignee; and where actual, rather than constructive possession is involved, as in the case at bar, the receiver's right should be stronger.

A *sheriff* is a court officer who has only possessory rights to goods attached by him, yet, where the goods were taken by him into another state and put in hands of a keeper, from whom they were taken by a stranger, the sheriff may maintain trespass against the stranger by reason of his "special property". *Brownell v. Manchester* (1822), 1 Pick (Mass.) 232; and the keeper may have his action under identical circumstances. *Utley v. Smith* (1835) 7 Vt. 154.

Analogies drawn from *foreign administrators* under the same circumstances of possession and removal are in accord, even though there be an ancillary administrator appointed by the State to which the property has been removed. See *Hill v. Barton* (1916), 194 Mo. App. 325, (cattle brought by a Texas administrator into Missouri); *Chamberlin v. Wilson* (1876), 45 Iowa 149, (promissory note brought into Iowa for action by a Nebraska administrator), and *Giddings v. Green* (1880), 48 Fed. 489, (Ohio administrator allowed to enforce a vendor's lien on Virginia realty).

A *finder* of property may have replevin against a stranger to the title. *Durfee v. Jones* (1877), 11 R. I. 558, and a *wrongful possessor* has a similar right against strangers. *Holmes: Common Law*, p. 242, citing authorities.

A *depositary* has a "special property" and so has a *borrower*. Theirs is simply a possessory right, but it will be good against strangers and support replevin or trover. *Holmes: Common Law*, p. 243; *Story: Bailments*, p. 280; *Harker v. Dement* (1850), 9 Gill (Md.) 7.

The gist of the matter lies in whether the petitioner's right to the cattle, after having reduced them to lawful possession in Oregon, is a "title" which should be recognized in a sister State. If the possessory right so acquired is a title—a "special property" in the cattle—it should be recognized as of right everywhere; and, historically, as demonstrated by Holmes J. in his *Common Law*", that is precisely the property right —mere possession—upon which the courts based the so-called "special property" generally held to be sufficient in dignity and quality as to command possessory remedies if the property were lost, and everywhere enforced except as against the true owner only.

Besides that, and because of his bond, petitioner has a further interest than that of mere possession; and if so-called "special property" or "necessary title" requires for support more than possession, that liability should supply it.

POINT B. — PETITIONER, AS A MANAGING RECEIVER, IS AND WAS LEGALLY ENTITLED TO THE CATTLE'S POSSESSION, OR THEIR VALUE, IF CONVERTED, NOTWITHSTANDING THEIR HAVING GONE OUTSIDE THE STATE OF OREGON.

Chicago Bonding & Surety Co. v. U. S., 261 Fed. 266.
The Willamette Valley, 66 Fed. 565.
Merchants Nat. Bank v. Penna. Steel Co., 57 N. J. L. 336.
Pond v. Cooke, 45 Conn. 126.
Robertson v. Staed, 135 Mo. 135.
Lyons v. Russell (1914) 41 App. D. C. 559.
Woodhull v. Farmers Trust Co., 11 N. Dak. 157.

All the above cases were concerned with managing and operating receivers, in the course of whose business it was expedient to send or take the goods outside the appointing state. As the New Jersey Court has said in *Merchants Nat. Bank v. Penna. Steel Co.* (supra) quoting from *Wilkinson v. Rutherford* (1887), 49 N. J. L. 244:

> "I cannot agree to the doctrine that a receiver is a mere custodian of the property of the person whom, in certain respects, he is made to supplant; for it would seem that he is an assignee of the assets within the scope of his office. There seems to be no reason why his power should not be co-extensive with his functions; and it is clear that he could not perform these functions unless upon the theory that some interest in the property, akin to that of an assignee, passes to him."

In *Cagill v. Wooldridge,* 8 Baxt. (Tenn.) 580, the court said:

> "But where the court of a sister State, having jurisdiction of the parties and subject-matter, and having the property within its actual control, appoints a receiver to take possession of and sell the property, and this order is executed by the property being actually taken into possession by the receiver, we think beyond doubt this would give to the receiver against the parties to the litigation, and those claiming through them, a special property and right of possession that would enable him to maintain an action of replevin, and that this right would not be lost by sending the property to this State for sale. To this extent we would respect the orders and judgment of the courts of sister States. The receiver can, in such case, maintain the action in his individual capacity."

In *Pond v. Cooke,* 45 Conn. 126, the court said:

> "But when property has once vested in a trustee, assignee or receiver, by the law of the State where the property is situated, it makes no difference whether it is done under the local law of the State or under the common law. The law of another State will not divest the trustee, assignee or receiver of his right to the property, should he take it into such State in the performance of his duty. The courts of such State will inquire whether he has such right to the property when it comes into the State as between himself and their own citizens, but when the fact that he has such right is ascertained, they will not regard it as important by what mode the right was acquired."

And the Supreme Court of Illinois said in *C. M. & St. P. Ry. v. Keokuk Packet Co.*, 108 Ill. 317:

> "The receiver was by his appointment authorized to manage the affairs of the corporation under the orders of the court. The business of the corporation was running boats on the Mississippi river, and chartering a barge for a trip up that river was but continuing the employ of the barge in the business of the corporation, and therefrom making an increase of the assets to be distributed among the creditors. . . . By taking the barge into his possession within the jurisdiction of the court that appointed him, a special property in the barge became vested in the receiver, and it is the established rule that where a legal title to personal property has once passed and become vested in accordance with the law of the State where it is situated, the validity of such title will be recognized everywhere. (Citing cases). Under this rule we hold that where a receiver has once obtained rightful possession of personal property situated within the jurisdiction of his appointment which he was appointed to take charge of, he will not be deprived of its possession, though he take it, in the performance of his duty, into a foreign jurisdiction; that while there it cannot be taken from his possession by creditors of the insolvent debtor who reside within that jurisdiction."

Importance of Issues

Petitioner herein was a managing receiver with extensive powers in operating the Skinner ranch. It

would be practically impossible to operate such a ranch near a State boundary so as to prevent cattle from passing across the line.

Most of our metropolitan centers are located near State boundary lines. If the decision below is to stand unmodified, this and many other receiverships will be embarrassed; and properties taken into sister States, and debts therein owing to the operating receiver, may be seized with impunity by unsatisfied creditors of the insolvent. The question, at the present time, with numerous receiverships in operation, is of vital importance. The designation of your petitioner as receiver may be considered as *descriptio personae*. (*McBride v. Oriental Bank*, 200 Fed. 895).

POINT C.—PETITIONER HAS "SPECIAL PROPERTY" BECAUSE OF HIS PERSONAL AND BONDED LIABILITY FOR THE CATTLE.

The record shows the receiver's bond to require an accounting for property taken into his possession (R. 17) and the cattle were so inventoried (R. 58).

As a keeper-bailee, petitioner had the possessory remedies against strangers everywhere as already shown.

A *servant* may have replevin if he must account for the property taken into his actual possession. (*Harris v. Smith*, S. & R. (Pa.) 23).

A receiver's bond is recognized as an independent liability, enforceable against the receiver and his sur-

ties in a separate action in courts other than the cause and court of the receivership. See discussion and legal history of such in opinion of Taft, J., in *Kirker v. Owings* (1899), 98 Fed. 499, 506 (C.C.A. 6).

The receiver, having the obligation to account for the property, cannot successfully show as an excuse or defense, that the property has been attached in another state. His liability was fixed by virtue of his Oregon possession. *Osgood v. Maguire,* 61 N. Y. 524.

Were the petitioner herein compelled to pay for the value of the cattle on his accounting, whether by summary proceedings, or on judgment secured in an action on the bond, he would clearly be entitled to the cattle under rights of subrogation. See *Fogg v. Hebdon,* 80 Miss. 750, 32 So. 285; *Bank of Midland v. Harris,* 114 Ark. 344, 170 S. W. 67, and *Goodrich v. Rochester Trust Co.,* 160 N. Y. S. 454, declaring subrogation rights of tax collector, county treasurer and foreign administrator respectively, where fiduciary has personally discharged the obligation involved.

POINT D.—PETITIONER HAS "TITLE" AS TRANSFEREE FROM AN OREGON CHATTEL-MORTGAGE.

An Oregon statute, unchanged since enactment in 1866, now found *Oregon Code 1930,* Sec. 54-207, reads as follows:

> "Whenever the condition of any mortgage of goods and chattels shall be broken, the mortgagee shall be entitled to the immediate possession of the mortgaged property, and when after breach of the condition of any such

> mortgage the possession of the mortgaged property shall not be delivered up to the mortgagee upon demand by him or by any person duly authorized by him to make such demand of the person or persons having such mortgaged property in possession, the mortgagee may recover the possession of such mortgaged property in the manner provided by chapter III of Title IV of the Code of Civil Procedure."

The reference in the statute to Chapter III, Title IV, is the Claim and Delivery Chapter of the Oregon Code.

From the time of this enactment, the Oregon cases have held that, on condition broken, the chattel-mortgagee had title to the goods and might sue in claim and delivery. *Moorhouse v. Donaca,* 14 Or. 430, 441; *Case Threshing Co. v. Campbell,* 14 Or. 460, 466; *First Nat. Bank v. Yocum,* 96 Or. 438.

A showing of mere possession is sufficient to support trover by a chattel-mortgagee. *Harvey v. Lidvall,* 48 Or. 558.

An Oregon receiver has a possessory right to the insolvent's property. *Neppach v. Beauvais* (1932), 138 Or. 524, 528.

The Skinners, by their deed of trust, for valuable consideration, had clothed the trustee with a property right, which, on default, became a possessory title. There was no title in W. S. Skinner to be attached.

The chattel mortgagee-trustee herein, having title, gave over its possession and surrendered the cattle to

petitioner. The transference was actual. Under the Idaho cases, the chattel-mortgagee's title would be respected in Idaho as against Idaho creditors of the mortgagor. *Cont. Nat. Bank v. Naylor* (1924), 39 Ida. 267. No good reason occurs to us, nor has any been suggested by others, why the transferee of the mortgagee-trustee should have less right or recognition.

Ancillary Proceedings Inadequate

In its opinion (R. 93. 94) the court below refers to petitioner as having no right to recover unless after ancillary appointment in Idaho. This is, of course, not a right; it is only discretionary whether ancillary proceedings may be had; and such may be refused. See *"Beale on Foreign Corporations"*, Sec. 791, p. 961, citing cases, including *Farmers L. & T. Co. v. Chi. & A. Ry.*, 27 Fed. 146, 158.

As a practical matter—and one of the glories of the common law is its common sense—the right to ancillary receivership, even if compulsory, would be a barren remedy. Consider the active movement of goods being shipped hourly from one state to another, or, as in the range country, as here involved, that cattle or sheep in southeastern Oregon must be driven to market and rail-head in either Nevada or Idaho, and the practical impossibility of a managing receiver to perform his duty without fatal embarrassment becomes evident. Happily the law of possessory remedies has never denied the lawful possessor the right to follow his chattels, and until the decision below, no Federal court, to our knowledge, has so spoken.

CONCLUSION

We respectfully submit that we have disclosed: (a) Conflict between the decision of the Court below and decisions of other Federal Courts; (b) no controlling decision by the Supreme Court; (c) the clear weight of authority to be opposed to the decision reached below as a matter of general law; (d) probable error in the decision below as a question of Federal law; and (e) the importance of questions involved and need of a decision of the Supreme Court settling the Federal law relating thereto.

We believe that this case calls for the exercise by this Honorable Court of its supervisory powers in order that petitioner may be permitted to present and try to conclusion on the merits, his cause in claim and delivery in the United States District Court for the District of Idaho, for the repossession or value of the cattle involved, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the United States Circuit Court of Appeals for the Ninth Circuit and finally reverse it.

JAMES G. WILSON,
JOHN F. REILLY,
GEO. B. GUTHRIE,
P. J. GALLAGHER,
508 Platt Building,
Portland, Oregon,
Counsel for Petitioner.

Portland, Oregon,
February 16, 1938.

INDEX

SUBJECT INDEX

PAGE

Supplemental Brief 1

"A"—Facts Touching Petitioner's Possession 2

"B"—Jurisdiction of the Federal Court in Claim and Delivery Brought Against an Idaho Attaching Sheriff 3

"C"—Requirement that Verified Claim Must be Submitted to Sheriff Before Action May be Brought 7

TABLE OF CASES

Bates v. Capital State Bank, 21 Ida. 141, 121 Pac. 561 ..... 5, 6

Chillicothe Co. v. Revelle, 14 F. (2d) 501 3

Cont. Nat. Bank v. Naylor, 39 Ida. 267, 228 Pac. 266 ..... 4, 6

Dimsdale v. Tolerton Co., 151 Iowa 425, 131 N. W. 689 11

Hannan v. Connett, 10 Colo. App. 171, 50 Pac. 214 11

Hare v. Young, 26 Ida. 682, 146 Pac. 104 4

Kellogg v. Burr, 126 Cal. 38, 58 Pac. 306 ..... 7, 10

King v. Hubbell, 42 Mich. 597, 4 N. W. 440 6

Leaf v. Reynolds, 34 Ida. 643, 203 Pac. 458 9

Megee v. Beirne, 39 Pa. 50 9

Montgomery v. Kirksey, 27 Ariz. 356, 233 Pac. 588 11

Neitzel v. Lawrence, 40 Ida. 26, 231 Pac. 423 9

Nisbeth v. Federal Title and Trust Co., 229 Fed. 644 10

N. C. Land, etc. Co. v. Boyer, Sheriff, 113 C. C. A. 162, 191 Fed. 552 4

Porter v. Davidson, Sheriff, 62 Fed. 626 5

State v. Rivers, 60 Iowa 381, 13 N. W. 73 2

Smith v. Consolidated Wagon Co., 30 Ida. 148, 163 Pac. 609 4

Sweeney v. Lomme, 22 Wall. 208 6

Wood v. Weimar, 104 U. S. 786 ..... 6, 7

Woodhull v. Farmers Trust Co., 11 N. D. 157, 90 N. W. 795 7

Wise v. Jefferis, 51 Fed. 641, 643 6

STATUTES CITED

Idaho Code 1932—

Sections 6-301 to 6-312 (6756 to 6767 Idaho Compiled Statutes 1919) 5, 7

Section 6-527 (6805 Idaho Compiled Statutes 1919) 7

Section 8-202 (6918 Idaho Compiled Statutes 1919) 8, 10, 11

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No. 736

IVAN E. OAKES,

Petitioner,

vs.

BEN LAKE, as Sheriff of Owyhee County, Idaho,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER

Certiorari having been granted by an order of this court (R 99), petitioner desires to add a short supplement touching matters other than the capacity of petitioner to sue in the Federal Court. These matters are:

(A) The facts touching petitioner's possession and related matters;

(B) The jurisdiction of the Federal Courts to entertain claim and delivery actions against an attaching State Sheriff; and

(C) The asserted necessity of a verified claim being presented to the State Sheriff as a prerequisite to bringing this action.

A — FACTS TOUCHING PETITIONER'S POSSESSION

The facts relating to the possession and possessory rights of petitioner following his appointment as receiver of the mortgaged properties of W. S. Skinner and Ella Skinner are narrated in petitioner's brief in support of his petition for a writ of certiorari at pages 11 to 14. The references to the Record made therein, together with the judgment roll in the Skinner foreclosure case (made Plaintiff's Trial Exhibit 1) disclose the Order of Appointment, Receiver's Bond, and testimony showing that the petitioner visited the Skinner ranch, presented his credentials (R 33, 45), inspected the premises, including some of the cattle (R 33, 38), was given a list of cattle by the trustee's (mortgagee's) representative, who was in charge (R 38). He arranged for the maintenance of the ranch, put a man in charge (R 34, 46) and arranged with the Skinners to put up the hay crop on shares (R. 52-54). He also made a report or inventory to the court, charging himself with properties on the ranch, including cattle (R 57, 58).

The facts need not be related in detail but the salient matters are almost identical with the facts shown in *State* v. *Rivers* (1882), 60 Iowa 381, where a receiver's visit to a farm, notification of appointment, and arrangement for tenancy and crops, was held to show sufficient "title" in the receiver to sustain an indictment for larceny from the "owner" of some of the chattels so taken. We

also refer to Judge Sanborn's holding that the delivery to a receiver of the key to a safety deposit box was sufficient to pass title to the receiver of its contents as a symbolic possession. (*Chillicothe Co.* v. *Revelle* (1926), 14 Fed. (2nd) 501.

The court below has treated the case as one of actual possession being assumed (R 93), which assumption is clearly warranted.

Besides this, as pointed out under Point "C" of our Brief in Support of Petition for Certiorari (pp. 33, 34) the petitioner has a property right in the cattle based upon his obligation to account, he having reported the same to the Oregon court and having given his bond conditioned on such accounting.

The very least that may be said is that the question of fact is sufficient to go to the jury, although the admitted requirement for an accounting and petitioner's liability under bond would seem to justify, as a matter of law, an instruction that the petitioner had a sufficient property right in the cattle.

B — JURISDICTION OF THE FEDERAL COURT IN CLAIM AND DELIVERY BROUGHT AGAINST AN IDAHO ATTACHING SHERIFF

Respondent's further contention is that a Federal court has no jurisdiction of this cause as against a State Sheriff holding property seized under a writ of attachment. The thought seems to be that the property so

attached is *in custodia legis,* and that all matters relating to title, and property rights touching the same, are not open to adjudication in other courts and must be determined solely in the court whose sheriff so seized the *res.* In his motion for "nonsuit", respondent's counsel stated his position (R 74):

> "Second, on the ground that the action against the Sheriff, being an action in replevin, will not lie in the United States Court to take property from the possession of a state court."

This statement of the law is probably too broad, but in this case (involving property already *pendente lite* under foreclosure in the Oregon courts) the very statement defeats respondent's asserted right to attach. The mortgaged chattels (cattle) were *in custodia legis* before attachment was made, and the Idaho court had no right to seize them, without doing violence to the Oregon court's rights. A similar contention was denied by the Circuit Court of Appeals, Sixth Circuit, (*North Carolina Land etc. Co.* v. *Boyer, Sheriff* (1911), 112 C. C. A. 162, 191 Fed. 552) holding that the attachment of mortgaged chattels in a state into which the chattels were temporarily brought, pending foreclosure proceedings in another state, subordinates the attachment to the foreclosure proceeding under the doctrine of *lis pendens.*

Idaho recognizes the rights of a foreign chattel-mortgagee as superior to those of an Idaho attaching creditor who has caused the chattels to be seized in Idaho. (*Hare* v. *Young* (1915), 26 Ida. 682; *Smith* v. *Consolidated Wagon Co.* (1917), 30 Ida. 148; *Cont. Nat. Bank* v. *Naylor* (1924), 39 Ida. 267.)

Under the Idaho practice, there is but one form of civil action, the complaint must state the facts in ordinary and concise language without regard to the ancient or common law forms of pleading; the common law action of replevin is not in force; claim and delivery is a provisional remedy and may be sustained if plaintiff states and proves a right of recovery irrespective of whether the personal property be seized or not; a plaintiff cannot be sent out of court unless he is on the facts entitled to no legal relief; and the issue of possession at the time of bringing the action, or the requirement that defendant be dispossessed is not necessary in order that a plaintiff may prevail; it is only necessary that plaintiff has a right to immediate possession. The law has been clearly expounded on all these matters. (*Bates* v. *Capital State Bank* (1912), 21 Ida. 141.)

It is clear to the point of demonstration that no conflict between the federal and state courts is involved, since there is no requirement that the state sheriff's possession be disturbed. In the case at bar no Affidavit of Claim, Requisition to the Marshal, or Claim and Delivery Undertaking, required for the taking of the chattels into the custody of the court below (§§ 6-302, 6-303, 6-304, *Idaho Code,* 1932), was made. There is no conflict of possession before the court.

The same contention was presented under the claim and delivery statutes of North Carolina in *Porter* v. *Davidson, Sheriff* (1894), 63 Fed. 626, before Simonton and Dick, J. J., and held that any conflict because of custody should be relieved by returning the chattels to

the attaching sheriff, but held the sheriff as a defendant liable under the cause of action stated in the complaint. This seems to be squarely in accord with the *rationale* of the Idaho Supreme Court in *Bates* v. *Capital State Bank*, supra.

There is, however, a respectable number of authorities for the entertainment by a federal court of a replevin action against an attaching state sheriff. The reasoning is that an attaching sheriff taking the property of a stranger to the writ of attachment is as much a trespasser as any other person and subject to the same actions; to be entitled to immunity, his possession must be lawful. Our Ninth Circuit Court of Appeals so held in *Wise* v. *Jefferis* (1892), 51 Fed. 641, 643, following *Sweeney* v. *Lomme* (1874), 22 Wall. 208.

Wood v. *Weimar* (1881), 104 U. S. 786, sustained a replevin in the Federal Court by a chattel mortgagee against an attaching Michigan sheriff. Waite, C. J. supported this right (p. 792) since the Michigan Supreme Court had held that a sheriff attaching mortgaged goods must surrender them to the mortgagee on demand (*King* v. *Hubbell*, 42 Mich. 597). The Idaho Supreme Court held in *Continental Bank* v. *Naylor* (1924), 39 Ida. 267, that an attaching Idaho sheriff must surrender possession of attached sheep to the "live stock lessor" (equivalent to chattel-mortgagee) although the "lease" was made in Utah (where it was valid) and thereafter for a period of years, the sheep were brought into Idaho, where the "lease" was not recorded, the "lessee" having signed a relinquishment of the "lease" to the "lessor" fifteen days

prior to the bringing of the attachment action. "The seizure of these sheep under attachment was wholly unwarranted, and without right," says the court (39 Ida. 275). This would clearly imply the "lessor's" right to a claim and delivery against the sheriff had the lessor chosen to bring that action instead of intervention; and, by parity of reasoning, a mortgagee of diverse citizenship, might have brought the action in the Federal Courts as in *Wood* v. *Weimar,* supra. Respondent herein, having the right to possession, as shown in our brief in support of his Petition for Certiorari, should have the same right.

Idaho took her claim and delivery statutes almost literally from California and North Dakota. (See Notes, Comp. Leg., to §§ 6-301 to 6-312 *Idaho Code, 1932*). California has held the attaching sheriff in such cases to be a trespasser and liable in an appropriate claim and delivery action (*Kellogg* v. *Burr* (1899), 126 Cal. 38; and the reasoning of North Dakota's Supreme Court supports the proposition that an attaching sheriff has no right so to possess chattels as against a foreign receiver (*Woodhull* v. *Farmers Trust Co.* (1902), 11 N. D. 157.

C — REQUIREMENT THAT VERIFIED CLAIM MUST BE SUBMITTED TO SHERIFF BEFORE ACTION MAY BE BROUGHT

A third contention of respondent in moving for a "nonsuit" was that the demand for the attached cattle made by petitioner Oakes upon the respondent sheriff was insufficient as not being in verified form as prescribed by the statutes (§ 6-527 *Idaho Code, 1932*) which reads:

> "If any personal property attached be claimed by a third person as his property, the same rule shall prevail as to the contents and making of said claim, and as to the holding of said property, as in the case of a claim after levy on execution, as provided in § 8-202.

The provision found in § 8-202 relating to execution and the claim of third parties is as follows:

> "If the property levied on be claimed by a third party as his property by a written claim verified by the oath of said claimant, setting out his title thereto, his right to the possession thereof, and stating the grounds of such title, and served upon the sheriff, the sheriff is not bound to keep the property, unless the plaintiff, or the person in whose favor the writ of execution runs, on demand, indemnify the sheriff against such claim by an undertaking by at least two good and sufficient sureties."

These sections provide a method by which the right of the third party may be determined by the sheriff and before the sheriff himself. Under no rules of construction can this method exclude a right of action which a third party may have and may desire to enforce in some other court of appropriate jurisdiction. Quite to the contrary it would seem that if the "claim" were made before the sheriff it would of itself be recognized as a selection by the third party, of the sheriff as a tribunal to determine his right to the exclusion of any other court.

Now, if the third party has a legal right to possess the property he cannot be required to enforce this before the sheriff who has unlawfully seized it. As a matter of right, he should sue in some other court.

It is clear from the quoted sections that the purpose of this "verified claim" is to protect the sheriff in the demand made upon him. The language of this section clearly shows that the sheriff may on a verified claim, that is, having the dignity of a claim supported by oath, take the position that he will not retain possession of the attached property unless the party who has brought the writ of attachment shall indemnify him.

It is pretty well settled that actions in claim and delivery should be based upon a demand made on the party possessing the same and their refusal to recognize the demand. This is, however, subject to exceptions. Thus it has been held by the Idaho Supreme Court in *Leaf* v. *Reynolds* (1921), 34 Idaho 643, that where the defendant in a claim and delivery action contests the case upon the claim of ownership and right of possession, then no previous demand on the part of the plaintiff is necessary. This decision was followed in the later case of *Neitzel* v. *Lawrence* (1924), 40 Idaho 26.

The precise question is whether or not, under the laws relating to attachment, a verified demand must be made before the sheriff before bringing an action in claim and delivery.

A third party may not be compelled to intervene in the attachment proceeding to preserve his property rights. In *Megee* v. *Beirne* (1861), 39 Pa. 50, 63, the court said:

> "But we know of no rule of law that compels him to come in on pain of forfeiting his rights. If a sheriff will seize one man's goods on process against another, the right of the owner to hold the officer

> responsible in this present form of action, is part of the law of property and cannot be denied to the suitor."

This rule has been enforced by the Federal Courts, and in *Nisbeth* v. *Federal Title and Trust Co.* (1916), 229 Fed. 644, 649, the Circuit Court of Appeals for the 8th Circuit said:

> "When the property of a party is seized under a writ of attachment against another, the owner is not confined in his remedy to intervention in the attachment suit. He may intervene or he may bring a suit in replevin or trover for conversion in any court of competent jurisdiction." (Citing Colorado authorities.)

The California statute, prior to recent amendments was similar to the Idaho law, except that it was more stringent, containing almost the same language as § 8-202, with the additional clause:

> "And no claim to such property is valid against the sheriff or shall be received or be notice of any rights unless made as above provided."

In the case of *Kellogg* v. *Burr* (1899), 126 Cal. 38, 42, the Supreme Court of California in a claim and delivery action had this identical question under consideration and after quoting the statute, said:

> "It has been held that said section 689 is intended for the protection of the sheriff (citing authorities). If such claim is made the sheriff is not bound to retain the property unless he is indemnified, and may

> release it without incurring a liability therefore to the plaintiff in an attachment or execution. The sufficiency of the notice is therefor a question between the officer and the plaintiff in attachment."

And that is the purpose of § 8-202 of the Idaho Code. It gives the sheriff an opportunity and reason, where a verified claim is made, to demand indemnity or release the property and minimize the damages for the wrongful taking. It varies the procedure between the sheriff and the attaching creditor and nowhere does it attempt to proscribe the rights of the owner of the property who is left to his election to sue in a separate action or make his claim before the sheriff.

To the same effect is *Montgomery* v. *Kirksey* (1925), 27 Ariz. 356; *Dimsdale* v. *Tolerton Co.* (1911), 151 Iowa 425; *Hannan* v. *Connett* (1897), 10 Colo. Ap. 171. We have found no opposing authorities.

The purpose of such a "demand" is to show an assertion by the plaintiff of his right to possession and give to the defendant an opportunity to comply therewith and save himself costs and expenses involved in litigation.

It would seem, as a matter of principle, that one, who has a right of action, may not be compelled to have that cause limited to, and be controlled by, a "claim" which must be filed with the offending party and subject to determination on the merits by that party himself.

CONCLUSION

Petitioner respectfully submits that the opinion, judgment and decree of the court below disclose manifest and reversible error in affirming the judgment of the trial court dismissing petitioner's action; and that the cause should now be reversed and a new trial ordered.

Respectfully,

JAMES G. WILSON,

JOHN F. REILLY,

GEO. B. GUTHRIE,

P. J. GALLAGHER,

For the Petitioner.

Portland, Oregon,
September 12, 1933.

INDEX

SUBJECT INDEX

	Page
Statement of the Case	1
Summary and Argument	3

TABLE OF CASES

Bates vs. Capital State Bank, 21 Ida. 141	16
Booth vs. Clark, 17 How. 322, 15 L. ed. 164	15
Buck vs. Colbath, 70 U. S. 347, 18 L. ed. 257	16
Covell vs. Heyman, 111 U. S. 176, 28 L. ed. 390	16
Freeman v. Howe, 65 U. S. 450; 16 L. ed. 749	16
Great Western Mining Co. vs. Harris, 198 U. S. 561, 576	15
Cumbel vs. Pitken, 124 U. S. 131, 31 L. ed. 347	16
Lammon vs. Feusier, 111 U. S. 17, 28 L. ed. 337	16
Lion Bonding Co. vs. Karatz, 262 U. S. 77	15
Palmer vs. Texas, 212 U. S. 118, 53 L. ed. 435	16
Pennsylvania Railroad Co. vs. Chamberlain, —— U. S. ——, 77 L. ed. ——. Advance Sheet No. 9, 1932 Term, Page 503 L. ed.	8
Pleasants vs. Fant, 22 Wall. 116, 22 L. ed. 780	8
Sterrett vs. Second National Bank, 248 U. S. 73	15
Taylor vs. Carryl, 61 U. S. (20 How.) 583	16
The Willamette, 66 Fed. 565	2
Wabash Railroad Company vs. Adelbert College, 209 U. S. 38, 52 L. ed. 379	16
White vs. Schloerb, 178 U. S. 542, 44 L. ed. 1183	16

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 736

IVAN E. OAKES, as Receiver,

PETITIONER,

vs.

BEN LAKE, as Sheriff of Owyhee County, Idaho,

RESPONDENT.

ON WRIT OF CERIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF RESPONDENT

The case is in this court on certiorari from the Circuit Court of Appeals for the Ninth Circuit. The action was brought in the Federal Court for Idaho to recover possession of certain cattle seized and held under process by an Idaho Sheriff. The plaintiff in the action (petitioner here) is a receiver appointed by an Oregon court in a proceeding to foreclose a mortgage on these cattle and on other property. On motion of the defendant Sheriff a non-suit was ordered by the trial court.

One of the grounds of the motion was lack of capacity in the foreign receiver to sue, it not being shown that he had reduced the property in dispute to his actual possession.

The point made by petitioner is that a receiver who has, in the jurisdiction of his appointment, taken actual possession of property, may sue without ancillary appointment in a federal court of another jurisdiction to regain possession of such property. The Circuit Court of Appeals is said to have held otherwise. There is language in the opinion that may be subject to this construction. Judge Sawtelle says:

> "Granting the soundness of the contention that the receiver was entitled to the undisturbed possession of the property and assuming that he actually had such possession, and granting or assuming that he had the power to sue locally in replevin for an unlawful interference with his right of possession, nevertheless such right of possession did not vest him with the title necessary to sue in the court below without an ancillary appointment therein;" (R. 93.)

The assumption of actual possession in the receiver appears to be a mere argumentative assumption, rather than a concession as to the state of the record. We do not believe the court intended or that it was necessary to declare the broad rule attributed to it by counsel. It is apparent from other portions of the opinion that the court has not departed from the principle laid down in the earlier opinion of Judge Gilbert in The Willamette,

66 Fed. 565, where the right of a foreign receiver to protect his actual possession is clearly stated.

But the case is properly to be disposed of on the basis of actualities rather than on assumptions. We think it unnecessary for us to take issue with counsel as to the state of the law, but only as to the state of the facts. We believe there is no sufficient evidence in the record to warrant its submission to the jury that the receiver reduced the cattle in dispute to his actual possession. On the contrary, the record discloses without substantial controversy that the cattle remained in the actual possession of the mortgagor and were seized on attachment in Idaho while still in his possession.

I.

The only evidence in the record on this subject is the testimony of the petitioner himself, plus some documentary evidence consisting of part of the files in the Oregon foreclosure suit. There was one other witness who testified, but his testimony is confined entirely to the subject of the value of the Skinner cattle, with which he had been generally familiar in prior years (R. 63-73). Since we take the view that a proper consideration of the facts should dispose of the case, we think it advisable to review the record in some detail, quoting from it where helpful.

On March 17, 1931, the Equitable Trust Company began foreclosure action in Malheur County, Oregon, against W. S. Skinner and wife. The receiver was appointed by ex parte order of the Oregon court on the

same day. The mortgage to be foreclosed covered certain cattle and horses, and also included a ranch situate some distance west of Jordan Valley in Malheur county. Aside from the mortgaged ranch, Skinner had two other ranches under lease from one Somerville, referred to in the record as the Reservoir Ranch and the Star Ranch (R. 42-44). The Reservoir Ranch is in Malheur County and the Star in Owyhee County, Idaho. It appears inferentially to have been on or in connection with these latter ranches that Skinner ran the mortgaged cattle. The lease-holds on the Reservoir and Star Ranches were not included in the mortgage to the Equitable Trust Company and the receiver had no jurisdiction over them (R. 43-44).

On March 28th following his appointment the receiver went to the Skinner Ranch west of Jordan Valley. This was the place under foreclosure. There were some cattle there at thetime. In the interest of clarity we will postpone discussion of the identity of these cattle to a later point in the brief, merely observing here that they were not shown to have been among the cattle later seized in Idaho. The mortgagor, Skinner, was not at the ranch but one Kirt Skinner was. The receiver presented to Kirt Skinner a copy of the order of his appointment but Skinner refused to recognize it or to deliver possession. We will quote the receiver's testimony (R. 34 and 45):

> "He further testified that, the day he came there, March 28th, Mr. Kirt Skinner was the only one there. He denied and disputed the right to have them taken over by the receiver at that time, at that particular time. He said there were part of the

cattle out on the range and part in the field, and that they would take care of them.

Q. Was there any further conversation had regarding the possession of the property with Skinner after you showed him the certified copy of the appointment?

A. He still objected.

Q. What did he say about taking care of the cattle?

A. He said he would take care of them. (R. 34.)

* * * * * * * *

Q. What conversation did you have with Kirt Skinner?

A. I handed him that paper and told him that the court had appointed me receiver and asked him to read it over.

Q. What did he say?

A. I do not remember that he said anything particularly right at that time, and then a little later he stated that for the present at least he would have to refuse to act under the order.

Q. That he would have to refuse to give you possession of the ranch?

A. Yes.

Q. What did you say?

A. I didn't answer.

Q. What did you do?

A. I went back to Jordan Valley and I believe I called Mr. Gallagher; I am not sure. (R. 45-46.)"

The receiver then went back to Ontario where he lived (R. 46), leaving a man on the Skinner ranch whose "duties were feeding what cattle and horses there were left there, doing general work and caring for the property." (R. 34.) This man "stayed until he took sick and

then was away for around two months and then came back." (R. 46.) The man is again referred to on Page 54 of the record where the receiver testified that he "had a man on the ranch, went there March 28th, stayed a month and a half, became ill, and left, went back with the Sheriff on August 22nd and remained there ever since." (R. 54.)

From March 28th until at least some time in July the receiver seems not to have functioned actively. Beyond making the trip to the Skinner ranch at the beginning of this period and leaving a man there, the record does not reveal his further movements until along in July. Meanwhile, about the last of June or the first of July the cattle in controversy were attached at the Star ranch in Idaho in an action brought in that state by Somerville against W. S. Skinner (R. 14). The cattle attached numbered 137 head, consisting of cows, steers, heifers and a number of calves (R. 41).

We now reach the crucial question whether up to that time the receiver had done anything to reduce these cattle to his actual possession.

We have observed that there were some cattle at the Skinner ranch when the receiver went there on March 28th. We wish now to look a little more closely into the identity of these cattle. If they were the same cattle afterwards attached in Idaho, then the receiver may be said to have taken a sort of scrambling possession of them; since, notwithstanding the refusal of Skinner to recognize his authority or to give up possession, still the received did leave a man on the place whose "duties

were feeding what cattle and horses there were left there."

We will point out in a moment that the Skinner cattle later attached in Idaho were not then at the Skinner ranch at all, but were at another place. For the present we want, so far as the record permits, to identify the cattle that were at the Skinner place at the time of the receiver's visit. The receiver did not count the number but "went around among them some." (R. 33.) On page 37 of the record he says he does not know what percentage of 100 head were there. When pressed by his counsel he says (R. 38) "That there were roughly about around 100 head." He does not describe them in any way as to age or kind.

What cattle were these? The receiver says (R. 33) "Part of them belonged to Mr. Skinner and some belonged to the Equitable Trust Company or the bondholders." On Page 46 he says that some of them also belonged to the Skinner boys. "The witness knew in addition to the W. S. Skinner stock the boys had certain stock not included in the property and over which he had no jurisdiction; that of the stock he saw on the 28th of March, some belonged to W. S. Skinner and some belonged to the boys." (R. 46.)

Thus, of the undetermined number and variety of cattle at the Skinner place when the receiver went there on March 28th, some belonged to the mortgagor, some belonged to the Equitable Trust Company or the bondholders, and some belonged to the Skinner boys. How many of them or of what variety belonged to the mortgagor, and therefore came under the receiver's jurisdic-

tion, no human intellect could determine from the record. The testimony affords hardly the basis for a guess. The receiver says (R. 37) that later "most of these cattle" then on the place were turned out of pasture and on the open range. When they were turned out, whether a month or three months later, whether before the attachment in Idaho or after, is not indicated; nor was the jury told whether the "most of them" turned out were mortgaged cattle or whether they were the ones belonging to the bondholders or to the Skinner boys.

At best, the record discloses a possibility that *some* cattle at the Skinner ranch at the time the receiver left a man there were later seized on attachment in Idaho, but it discloses no more than a possibility. Evidence as to approximate number or kind is wholly lacking. The subject was one capable of fairly definite proof and the receiver was suing to recover specific property. The burden of proof was on him. No case was made on this point which would warrant its submission to a jury, nor could the jury have reached any intelligent conclusion on the point had the case been submitted to it.

This court has said that

> "Before evidence may be left to the jury, 'there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.'"
>
> Pennsylvania Railroad Co. v. Chamberlain, ... 77 L. Ed. ..... Advance Sheet No. 9, 1932 Term Page 503 L. Ed.
>
> Pleasants v. Fant, 22 Wall. 116, 22 L. Ed. 780.

Turning again to the record, we find that it discloses quite clearly that the cattle seized by the defendant sheriff in Idaho were not at the Skinner ranch when the receiver went there on March 28th. It shows with equal clarity where they were at the time and that at no time did the receiver reduce them to his actual possession.

On cross examination of the receiver this colloquy occurred:

> "Q. I will ask you whether you saw these cattle supposed to be taken by the sheriff.
>
> A. I am not sure of it.
>
> Q. You do not know whether you ever saw them at all?
>
> A. No.
>
> Q. Then you do not know the quality of them from your own knowledge?
>
> A. These particular ones?
>
> Q. That the Sheriff seized, yes.
>
> A. I never saw them, no, sir." (R. 35-36.)

As to the whereabouts of the Skinner cattle, later taken into custody by the Idaho sheriff, the receiver testified as follows:

> "Q. On the 28th of March you went over to the Skinner ranch?
>
> A. Yes.
>
> Q. That is the place—that is not one of the places that Skinner had leased from Somerville?
>
> A. No, that is property that he owned over there.
>
> Q. That is the ranch that was included in the mortgage to the Equitable Trust Company?
>
> A. Yes.

* * * * * * *

Q. And who was there?

A. Kirt Skinner.

* * * * * * *

Q. What conversation did you have with Kirt Skinner?

A. I handed him that paper and told him that the court had appointed me receiver and asked him to read it over.

Q. What did he say?

A. I don't remember that he said anything particularly right at the time, and then a little later he stated that for the present at least he would have to refuse to act under the order.

Q. That he would have to refuse to give you possession of the ranch?

A. Yes.

Q. What did you say?

A. I didn't answer.

Q. What did you do?

A. I went back to Jordan Valley and I believe I called Mr. Gallagher; I am not sure.

* * * * * * *

Q. *Mr. Kirt Skinner told you where the cattle were that you had come to look at?*

A. *He did.*

Q. *Where did he say they were?*

A. *As I remember it, it was the Reservoir Ranch.*

Q. You had no jurisdiction over the Reservoir Ranch as you understood it.

A. No, sir.

Q. You were not entitled to possession of the Reservoir Ranch?

A. No, sir.

Q. *Did you understand from Skinner that these cattle the you were supposed to take charge of were in a field on the Reservoir Ranch.*

A. I don't think he said; I don't remember him saying that way, *he said they were at the Reservoir Ranch.*

Q. That was the 28th of March, wasn't it?

A. Yes.

* * * * * * * * * * *

Q. At any rate, you understood that the W. S. Skinner cattle were on the Reservoir Ranch; Kirt Skinner said they were in the field there?

A. There was nothing said whether they were in the field or outside.

Q. You assumed they were not in the field?

A. I don't remember forming any opinion either way.

Witness testified that he didn't go to Reservoir Ranch to look at any cattle; that he did not send anybody over there; that he didn't know how long the cattle remained at the Reservoir Ranch; that he didn't know which of the Skinner boys was at the Reservoir Ranch looking after the cattle; that he didn't know the circumstances under which the Skinner boys turned these cattle off the Reservoir Ranch; that he didn't know when they were turned on the range nor under what circumstances nor when nor by whom they were turned off the ranch.

Q. You don't know anything about it—do you know whether or not it was customary to summer these cattle in the neighborhood of the Star Ranch?

A. I do not know.

Q. That was their summer range?

A. I do not know.

Q. If turned on the range they would naturally go up around the Star ranch in Owyhee County?

A. I do not know.

Q. Where did you suppose they were going then?

A. I was not familiar, I couldn't say.

Q. You didn't go down to find out?
A. No, sir.
Q. Or send anybody to find out?
A. No sir.

Q. You have since learned because these cattle were seized by the Sheriff of Owyhee County that as a matter of fact they did go in the vicinity of the Star Ranch in Owyhee County?

A. That is where they were taken, yes." (R. 44-48.)

We have undertaken to analyze the relevant portions of the record with some care because of a tendency on the part of counsel for the petitioner to confuse the facts. This tendency is noticeable both in the direct examination of the receiver on the trial and in the statement of facts on appeal.

As an example see the following question and answer on pages 37 and 38 of the record:

"Q. I will ask you how many cattle, about how many cattle you took possession of, constructively or actually passing to you as receiver and as reported to the court under this trust."

This question is a fair example of the not very difficult art of obfuscation. The answer elicited is as follows:

"A. The list given me by the representative of the trustee that was in charge of the place at the time of the foreclosure.
Q. How many was that?
A. 141, I believe."

Upon this portion of the record counsel seem to base much of their contentions here. What information is conveyed by it we do not pretend to say.

In their statement of the facts in the petition counsel say:

> "The mortgagors breached the conditions of the deed of trust, and possession of the ranch and cattle was turned over to the trustee-mortgagee."

The record may be searched in vain for evidence that the possession of the mortgaged cattle was turned over to the trustee.

Again, counsel say on Page 13 of the petition:

> "The receiver * * on March 28, 1931, visited the ranch and presented his credentials**," and "thereupon arranged for the continued maintenance of the ranch, put a man in charge of the premises, arranged with the Skinners for the production of the hay, permitting them to remain on the ranch and pay as rental therefor a share of the hay grown."

The thought intended to be conveyed here is that on March 28th the receiver arranged with the mortgagor for the care and custody of the mortgaged property. This is a plain perversion of the record. The receiver testified (R. P. 49) that "The (Oregon) Sheriff made the sale in the foreclosure proceedings on the 22nd of August." This sale was of the real property only. (See order set out on Page 61 of the record.) On August 24th, following the sale, and on the application of the receiver, the Oregon court made an order to the effect that the receiver "be immediately put into possession

and that the Sheriff of this county is hereby ordered and directed to remove the defendants W. S. Skinner and Ella Skinner * * from said premises, and to place said Ivan E. Oakes in possession thereof."

The receiver testified that after the foreclosure sale, and evidently after the entry of the above order, he made arrangements with the Skinners for the harvesting of crops on the land. (R. Pp. 52-53.) Also that the order of August 24th putting him into possession was made after the Sheriff seized the cattle in Owyhee County. (R. Pp. 52-53.) As elsewhere stated the latter event took place in the latter part of June or the first of July.

It is apparent from this that any arrangements made with the Skinners for the custody and care of the mortgaged property were made at a date long subsequent to the seizure of the livestock by the Idaho officer.

Taking the record by its four corners, it is plain enough that the receiver at no time obtained actual possession of the livestock in dispute. His testimony reveals that the custody and control of them lay with the Skinners; and that the latter did not attorn to him or undertake to hold this property for him. Cattle on the range require a certain amount of attention. They require riding and salting, the branding of young calves in the springtime, attention to such details as the insuring of adequate feed and access to water. They are not left on their own like wild animals.

The receiver made not so much as a gesture in the direction of reducing these animals to his possession. He at no time exercised any dominion or control over them. That species of title which may be said to vest

in an actual possessor of tangible personality was not enjoyed by the petitioner here. So far as revealed by the record, the cattle were handled by the mortgagor as they had always been handled. They appear to have been ranged by him in two states, Oregon and Idaho. In the former state a receiver was appointed who confessedly had a right to reduce them to his possession, but who did not do so. In Idaho, rights of a resident creditor were asserted and the cattle seized in that state by an officer of its courts. It was a case for ancillary receivership in the latter state. In such proceedings the rights of resident creditors could be protected, or at least litigated in an orderly way and the property administered if necessary. Instead, the Oregon receiver, with no actual possession to vest him individually with a special title and with only the order of the Oregon court to clothe him with authority, brought replevin summarily to wrest possession from the Idaho Sheriff.

It was, as said by the Circuit Court of Appeals, a case governed by the rules laid down by this court in

Booth v. Clark, 17 How. 322, 15 L. Ed. 164;

Great Western Mining Co. v. Harris, 198 U. S. 561, 576;

Sterrett v. Second National Bank, 248 U. S. 73;

Lion Bonding Co. v. Karatz, 262 U. S. 77.

II.

While the Circuit Court of Appeals did not rest its decision upon the point, the case is governed by the long line of decisions of this court holding that an action

will not lie in a federal court to recover possession of property seized and held under process issued from a state court.

Taylor v. Carryl, 61 U. S. (20 How.) 583;
Freeman v. Howe, 65 U. S. 450, 16 L. Ed. 749;
Covell v. Heyman, 111 U. S. 176, 28 L. Ed. 390;
Gumbel v. Pitken, 124 U. S. 131, 31 L. Ed. 374;
Buck v. Colbath, 70 U. S. 347, 18 L. Ed. 257;
White v. Schloerb, 178 U. S. 542, 44 L. Ed. 1183;
Lammon v. Feusier, 111 U. S. 17, 28 L. Ed. 337;
Wabash Railroad Company v. Adelbert College, 209 U. S. 38, 52 L. Ed. 379;
Palmer v. Texas, 212 U. S. 118, 53 L. Ed. 435.

One of the grounds of the motion for non-suit granted by the trial court was that the action could not be maintained against an officer of the state court holding the property under process.

Petitioner relies on Bates v. Capital State Bank, 21 Ida. 141, 121 Pac. 561. It is stated in the syllabus of that case that under the requirements of the Idaho statute "if the plaintiff is successful in his action, judgment must be for the possession of the property or the value thereof in case a delivery cannot be had." This language is found also in the body of the opinion. A defendant, subject to such judgment as the court says must be entered, has no option whether he will deliver possession or pay the value of the property. He must give up possession if he has it.

We believe the decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

WILLIAM HEALY,
Residence: Boise, Idaho;
EARL E. GARRITY,
Residence: Silver City, Idaho,
Counsel for Respondent.

REPRINT

SUPREME COURT OF THE UNITED STATES.

No. 5.—OCTOBER TERM, 1933.

Ivan E. Oakes, Petitioner, *vs.* Ben Lake, as Sheriff of Owyhee County, Idaho.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[November 6, 1933.]

Mr. Justice SUTHERLAND delivered the opinion of the Court.

This is an action under the Idaho "claim and delivery" statute brought by petitioner in the federal district court for the district of Idaho. The complaint alleges that petitioner is a resident and inhabitant of the State of Oregon, and is the duly qualified receiver of the property which is the subject matter of the action, having been so appointed by an Oregon state circuit court; that following his appointment and qualification, and prior to March, 1931, as such receiver he took into his possession certain designated cattle, and has ever since been entitled to the immediate and exclusive possession thereof; that about the first day of July, 1931, the respondent took possession of the cattle in the State of Idaho by virtue of a writ of attachment; that respondent has refused to return said cattle to petitioner, although demand therefor was made prior to the commencement of the action. Judgment was prayed to the effect that petitioner is the owner and entitled to the immediate possession of the cattle, and in lieu thereof that he recover from respondent the sum of $5,000.

The answer, among other things, denies that petitioner took possession of the cattle as alleged, or any of them, and avers affirmatively that respondent in his official capacity seized the cattle upon a writ of execution duly issued by an Idaho state district court.

The case was tried before the federal district court and a jury. Petitioner offered evidence tending to show that he had taken actual possession of the cattle in the State of Oregon, and that the cattle thereafter were found in Idaho and there seized by respon-

dent. At the conclusion of petitioner's case respondent moved for non-suit and dismissal, upon the grounds, (1) that the proof shows that plaintiff had no capacity to sue in the courts of Idaho, since he had neither title to the property under the Oregon law or the order of the court appointing him, nor actual possession thereof, either in the State of Oregon or in the State of Idaho; (2) that an action of replevin will not lie in a United States court against a sheriff to take property from the possession of a state court. A third ground was urged, which we do not consider. It is without merit and is not pressed here. The court granted the motion, saying "that the proof is insufficient to initiate the liability on this hearing."

1. Upon appeal to the circuit court of appeals, that court, without considering other assignments of error, affirmed the judgment upon the ground that a receiver appointed in a state court is not entitled to sue in a foreign jurisdiction to repossess cattle, which, after being put in charge of his agent, cross over the boundary line into a foreign jurisdiction. Although respondent contends otherwise, the court below reached that conclusion in the face of an assumption that actual possession of the cattle had been taken by petitioner in Oregon. The language of the court follows:

"Granting the soundness of the contention that the receiver was entitled to the undisturbed possession of the property *and assuming that he actually had such possession* [italics supplied], and granting or assuming that he had the power to sue locally in replevin for an unlawful interference with his right of possession, nevertheless such right of possession did not vest him with the title necessary to sue in the court below without an ancillary appointment therein; and he was not entitled to bring the suit as a matter of comity." 62 F. (2d) 728, 730.

Upon the same assumption, namely, that the receiver had reduced the property to his actual possession in the State of Oregon, we reach a different conclusion.

The general rule undoubtedly is that an ordinary chancery receiver, having no other authority than that arising from his appointment as such, cannot as of right maintain an action in a state other than that in which he was appointed. The decision in *Booth* v. *Clark,* 17 How. 322, to that effect has been uniformly followed by this court. See, for example, *Great Western Mining Co.* v. *Harris,* 198 U. S. 561; *Sterrett* v. *Second National Bank,* 248 U. S.

73. The very terms in which the rule is expressed, however, clearly recognize that where the receiver has "other authority than that arising from his appointment as such," he may under some circumstances maintain an action outside the state of his appointment. And so it definitely has been held.

The foreign receiver may maintain such a suit, so far at least as the federal courts are concerned, where title to the property in question has been vested in him by conveyance or statute. In *Bernheimer* v. *Converse*, 206 U. S. 516, it was held that a receiver might sue in a foreign jurisdiction to collect upon the statutory liability of stockholders of a corporation, where the statute of the state conferred the right upon the receiver as *quasi*-assignee. Following that decision, this court, in *Converse* v. *Hamilton*, 224 U. S. 243, 256 *et seq.*, while reiterating the rule laid down in *Booth* v. *Clark, supra*, pointed out that the receiver suing in the *Hamilton* case was not merely an ordinary chancery receiver, but much more; that under the laws of the state of his appointment he became a *quasi*-assignee, vested with the rights of the creditors against the stockholders, and charged with the enforcement of those rights in the courts of the state and elsewhere; that his right to maintain an action in another state properly could not be denied as presenting a question only of comity unaffected by the full faith and credit clause of the federal Constitution. The case involved the right of a receiver of an insolvent Minnesota corporation to maintain a suit in Wisconsin against two stockholders to enforce an asserted double liability imposed by the Minnesota statute. The Wisconsin court refused to entertain the suit, holding it to be a matter of comity; but this court, denying that view, reversed on the ground that thereby the laws of Minnesota and the judicial proceedings of that state had not been accorded the faith and credit to which they were entitled under the federal Constitution.

In the case just dealt with, and in other cases where the receivership property has been assigned to the receiver by its owner, the suit is brought not strictly in his capacity as receiver, by virtue of his appointment in another state, but in his capacity as assignee. High, Receivers, 4th Ed., § 244. His designation as receiver, etc., in the title of the cause may be regarded as *descriptio pensonae* merely.

Coming immediately to the present case, the authorities, federal and state, are in practical accord to the effect that where the re-

ceiver appointed in one state has taken possession of property which thereafter is found and seized upon process in another state, the receiver may maintain an action in the latter state to recover possession or for other appropriate relief. *The Willamette Valley*, 66 Fed. 565, 567; *Hopkins* v. *Lancaster*, 254 Fed. 190, 191-192; *Wilkinson* v. *Culver*, 25 Fed. 639; *Jenkins* v. *Purcell*, 29 App. D. C. 209, 215; *Lyon* v. *Russell*, 41 App. D. C. 554, 559; *Pond* v. *Cooke*, 45 Conn. 126, 132; *Robertson* v. *Staed*, 135 Mo. 135, 137; *Woodhull* v. *Trust Co.*, 11 N. D. 157, 163-164; *Cagill* v. *Wooldridge*, 67 Tenn. (8 Baxt.) 580, 582-583. Other cases might be cited to the same effect. The only decision which we have found definitely to the contrary is *Humphreys* v. *Hopkins*, 81 Cal. 551, but in which there is a convincing dissenting opinion in harmony with the general current of authority.

In some of the cases cited the courts seem to have put their determination in favor of the receiver upon the ground of comity. With this view, however, we do not agree. It is a matter of right, as this court has said. *Converse* v. *Hamilton, supra.* The true rule is stated in *Robertson* v. *Staed, supra*, by the supreme court of Missouri, where it was held that where the receiver has taken possession of property in pursuance of his appointment, a special property is thereby vested in him which enables him to maintain a suit for the recovery of the property in a foreign jurisdiction; and that the principle upon which that may be done is "one of law and not of comity."

2. The other ground upon which respondent asked a dismissal of the action by the trial court is that an action of replevin "will not lie in a United States court against a sheriff to take property from the possession of a state court." Respondent, in support of that contention, relies on *Freeman* v. *Howe*, 24 How. 450, and later cases decided by this court following that decision. It was held in the *Freeman* case that replevin would not lie in a state court against a United States marshal who held property seized by him under process issued by a federal court,—this, for the reason, as stated in *Covell* v. *Heyman*, 111 U. S. 176, 179, that such property is in the custody of the law and within the exclusive jurisdiction of the court, from which the process has issued, for the purposes of the writ; that to disturb this possession by process from a state

court would be to invade the jurisdiction of the federal court by whose command it is held.

We do not stop to consider whether this rule is applicable to the present case, where the property is in the hands of a sheriff under process issued by a state court, and the action to recover possession, normally within the exclusive jurisdiction of the state courts, is brought in a federal court on the sole ground of diversity of citizenship.* We find it unnecessary to do so for the reasons now to be stated.

The effect of the Idaho so-called claim and delivery statute is to abolish the common law action of replevin and substitute therefor the statutory action. Under the statute the action will lie whether immediate possession be demanded or not. If immediate delivery be claimed, an affidavit must be filed setting forth certain facts, and a written undertaking in a prescribed form be given. Here petitioner filed no affidavit or undertaking, nor did he seek the immediate possession of the property. If, upon the trial, he proves his case, the form of judgment prescribed by the statute is for the possession of the property or the value thereof *in case a delivery cannot be had.* *Bates* v. *Capital State Bank*, 21 Ida. 141, 149.

Respondent's position is based upon the view that since a state court cannot interfere with property held by a United States marshal under process issued by a federal court, by parity of reasoning a federal court cannot interfere with property held by a sheriff under process issued by a state court. Petitioner—making no attempt to distinguish the one case from the other—in terms neither concedes nor denies this view. He replies simply that under the Idaho statute no conflict between the courts is involved, for, since the sheriff's possession has not been and need not be disturbed, there is no question of conflict of possession before the court. He rests his case, in this respect, upon the provision of the statute allowing judgment for the value of the property where delivery cannot be had. In this aspect, we put aside the question of intereference with the jurisdiction of the state court as not being really involved. If, upon a new trial, petitioner and re-

*Compare Wise *v.* Jefferis, 51 Fed. 641; Gilman *v.* Perkins, 7 Fed. 887; Wood *v.* Weimar, 104 U. S. 786.

spondent unite in the view that a delivery cannot be had, we perceive no reason why the trial court may not proceed with the case upon that theory and dispose of it as one to recover the value of the property and damages; and we hold accordingly. Should a different situation be presented, it can be appropriately dealt with when it arises. That under the Idaho statute the court may thus dispose of the case when for any reason a delivery cannot be had, is a proposition which finds abundant support in the decisions. *Boley* v. *Griswold,* 20 Wall. 486; *Erreca* v. *Meyer,* 142 Cal. 308, 310; *Claudius* v. *Aguirre,* 89 Cal. 501, 504 *et seq.*; *De Thomas* v. *Witherby,* 61 Cal. 92, 97; *Donovan* v. *Aetna Indemnity Co.,* 10 Cal. App. 723, 727-729.

In *Porter* v. *Davidson,* 62 Fed. 626, 629, a similar conclusion was reached under a North Carolina statute. That court, after stating the rule laid down in *Freeman* v. *Howe, supra, Covell* v. *Heyman, supra,* and other cases, held that these decisions went only to the possession of the *res,* and that the remedy might be pursued against the sheriff for damages in any court. "The proceedings of the plaintiff in this case by which he took from the possession of the sheriff the chattels levied on was ancillary, not in any way affecting the merits of the original case. That can go on without conflicting with any of the cases quoted above."

The court of appeals did not consider the question whether petitioner had made out a case of actual possession in Oregon. Nor can we say from the very general words of the judge in granting respondent's motion and in discharging the jury that this precise question of fact was passed upon by the trial court. We, therefore, do not consider it, but leave it to be disposed of in the further proceedings which must be had in the district court.

Judgments reversed and cause remanded to the district court for further proceedings in conformity with this opinion.

A true copy.

Test:

Clerk, Supreme Court, U. S.